

**Enforcing Rights Generated In Court-Connected  
Mediation—Tension Between The Aspirations of  
a Private Facilitative Process and the Reality of  
Public Adversarial Justice**

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TABLE OF CONTENTS

I. MEDIATION: “THE BETTER WAY” ..... 510

II. ENFORCING MEDIATED SETTLEMENT AGREEMENTS..... 516

    A. *Is Mediation a Step in the Adversary Process or an  
        Alternative Approach to Resolving Disputes?*..... 516

    B. *Should Traditional Principles of Contract Law Be Applied to  
        Mediation Settlements?* ..... 517

III. JUDICIAL APPROACH ..... 520

    A. *Contract Law Applied to Mediation Settlements* ..... 520

    B. *Objective Manifestation of Agreement vs. Self-Determined  
        Agreement* ..... 521

    C. *Agreements, Agreements to Agree, or No Agreement at All* ..... 524

    D. *Duress/Undue Influence—Mediation Style*..... 527

    E. *Fraud/Misrepresentation* ..... 535

    F. *Mistake*..... 537

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\* Professor of Law, Hamline University School of Law. I thank Sara Noel and Rachael Severson, students at Hamline University School of Law, for their invaluable assistance in the preparation of this manuscript. I also thank Jonathon Trexler and Nicole Strand for their research assistance. I am in debt to James Cohen, Director of The Dispute Resolution Institute at Hamline University School of Law, who was my mediation trainer, is my valued colleague, and has supplied me both with the initial idea to address this issue as well as innumerable suggestions and citations along the way. I also thank my friends and colleagues Bobbi McAdoo and William Martin, Professors at Hamline University School of Law, for their wonderful support and guidance in this research. Needless to say, despite all the quality advice and assistance I received, the mistakes and opinions expressed are mine and cannot be blamed on my colleagues. We all are indebted to the large community of dedicated scholars who have from various perspectives addressed the tension between the goals, policy, and practice when ADR processes are thrust in the midst of the adversary system. Among others, I was inspired and influenced by the writings of Professors James Alfini, Professor of Law, Northern Illinois University College of Law, Carrie Menkel-Meadow, Professor of Law, Georgetown University Law Center, Nancy A. Welsh, Associate Professor of Law, Dickinson School of Law, and of course, Professor McAdoo. Finally, I thank Hamline University School of Law for providing me a grant to research and write this Article.

IV.	LEGISLATIVE RESPONSE .....	539
	A. <i>Settlements in Mediations Require Different Rules</i> .....	539
	B. <i>Return to Formality—Return to the “Seal”</i> .....	541
	C. <i>Requiring a Writing for Mediated Settlement</i> .....	542
	D. <i>Really Technical Rules—Magic Words</i> .....	546
V.	COMMENTATORS—FLEXIBLE CONTRACT PRINCIPLES MIXED WITH BRIGHT-LINE RULES .....	547
VI.	IMPOSING RIGID BRIGHT-LINE RULES TO A PROCESS PREMISED ON SELF-DETERMINATION .....	550
VII.	THE TENSION BETWEEN CONTRACT PRINCIPLES AND MEDIATION’S GOALS .....	555
	A. <i>The Context of Mediation Is Different from Private Negotiation</i> .....	555
	B. <i>The Mediator as Neutral Facilitator or Advocate for Settlement</i> .....	557
	C. <i>Applying Contract Law Within the Context of Mediation</i> .....	562
	D. <i>Using Mediation Secrecy Rules to Preclude Supervision of the Mediation Process</i> .....	564
VIII.	REGULATING THE PROCESS .....	567
IX.	CONCLUSION .....	572

### I. MEDIATION: “THE BETTER WAY”

No official gathering of mediators is complete without one participant proclaiming in ritualistic style the accepted tenet that mediation is “the better way.” By empowering the participants, mediations produce a high rate of party satisfaction creating results that last. Although citations are not always provided, the genesis of this dogma likely stems from the famous study of small claims court mediations in Maine in the 1980’s.<sup>1</sup> The authors of that study concluded that the consensual processes of mediation generated greater party satisfaction, which in turn led to greater compliance.<sup>2</sup> They explained:

Consent, unlike command, brings with it an assumption of responsibility for the settlement and for its implementation. This sense of responsibility, along with general normative pressures to live up to commitments can weigh heavily on disputants, even those who may regret having given consent in the heat of negotiation or mediation. The more explicit these pressures, the more effective they are. Our data suggest that the personal and immediate

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<sup>1</sup> Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC’Y REV. 11 (1984).

<sup>2</sup> *Id.*

commitments generated by consensual processes bind people more strongly to compliance than the relatively distant, impersonal obligations imposed by authorities.<sup>3</sup>

While some have questioned these conclusions,<sup>4</sup> it remains a working assumption that mediation produces high party satisfaction and settlements that last.

Court-connected mediation processes have flourished.<sup>5</sup> Although the focus in the mediation process on facilitation, self-determination, and conciliation might appear inconsistent with the essence of adversarial justice, the judicial system's predominant concern about docket control provides a strong overlapping zone of interest. In the last decade, facilitators were not only invited to the party, but asked to sit at the head of the adversarial table. The number of mediations multiplied as courts happily sent parties to private mediators never to see the case again.<sup>6</sup> Few disputes involving mediations were reported in published opinions. The dearth of contested cases supported the notion that parties enthusiastically comply with mediated settlement agreements. Empirical studies further reinforced the belief that mediation participants came away from mediations happy, compliant, and satisfied.<sup>7</sup>

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<sup>3</sup> *Id.* at 44 (citation omitted); see also Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court, The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 354 (1995) (concluding that "differences in the effectiveness of mediation versus adjudication are due [to the differences in the two processes]").

<sup>4</sup> See Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85 (observing that "the notion that Americans who believe they have a legal claim prefer to resolve such claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict context"); Neil Vidmar, *The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation*, 18 LAW & SOC'Y REV. 515, 515 (1984) (suggesting as an alternative conclusion that the high compliance rates result from the fact that defendants have at least partially admitted to some liability in these settlements); see also Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1358 (1994) (suggesting that satisfaction or settlement rates are not a reasonable indicator of the quality of a particular process).

<sup>5</sup> See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 415-21 (1997) (providing a "Brief Intellectual History of Alternative Dispute Resolution and Legal Ethics").

<sup>6</sup> Court-connected mediation of family law cases raises specialized issues and are not specifically addressed in this Article.

<sup>7</sup> See, e.g., Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 886 (1998)

Recently, however, reports of disgruntled, or at least disappointed, participants in court-connected mediation processes have increasingly found their way back into the litigation process.<sup>8</sup> In the last few years, a half-dozen state supreme courts,<sup>9</sup> hundreds of lower courts, and numerous legal scholars<sup>10</sup> have addressed the issues raised when the consensual process of mediation creates disharmony rather than acquiescence and peace. In addition, nearly all of the energy and debate leading to the approval of the Uniform Mediation Act centered on questions of privilege and confidentiality of mediation sessions as mediators throughout the country took seriously the prospect that their mediations would become the source of additional litigation.<sup>11</sup>

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(analyzing empirical research on the parties' satisfaction in mediation processes); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 392 (1997) (concluding that "research consistently shows such increased satisfaction, particularly when litigants use the mediation process").

<sup>8</sup> See Duane W. Krohnke, *Mediation's Case Appearances Are More Frequent in 1998*, 17 ALTERNATIVES TO HIGH COST LITIG. 1, 1 (1999) ("As mediation use increases, its appearance as the subject of litigation rises as well. Last year, mediation continued moving from a tangential issue in court cases to the object of the suits.").

<sup>9</sup> *Vernon v. Acton*, 732 N.E.2d 805, 806 (Ind. 2000) (refusing to enforce an oral agreement reached during a mediation because of court rules of confidentiality); *Haghighi v. Russian-Am. Broad. Co.*, 577 N.W.2d 927, 928–29 (Minn. 1998) (refusing to enforce a written mediation settlement document signed by the parties and attorneys because it did not comply with a state statute that required written mediation settlement agreements to state that they are binding); *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001) (refusing to enforce a mediated settlement agreement absent agreement on the terms of the release), *reh'g denied*, 553 S.E.2d 36 (N.C. 2001); *Strategic Staff Mgmt., Inc. v. Roseland*, 619 N.W.2d 230, 234–36 (Neb. 2000) (enforcing a signed mediated settlement agreement that called for a general release); *Golding v. Floyd*, 539 S.E.2d 735, 736–38 (Va. 2001) (refusing to enforce a signed "settlement agreement memorandum" that was expressly made "subject to [the] execution of a formal agreement consistent with the terms herein"); *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 41 (Va. 1995) (enforcing an oral agreement in settlement negotiations that contemplated a subsequent execution of a formal, written "Mutual Release and Settlement Agreement"); *Riner v. Newbraugh*, 563 S.E.2d 802, 809 (W. Va. 2002) (refusing to enforce an alleged agreement drafted by the mediator when it did not address disputed terms relating to the scope of the release).

<sup>10</sup> See, e.g., James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 172–73 (2001); Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001); Steven Weller, *Court Enforcement of Mediated Agreements: Should Contract Law be Applied?*, 31 JUDGES' J., Winter 1992, at 13; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1, 6–7 (2001).

<sup>11</sup> See generally Michael B. Getty, *The Process of Drafting the Uniform Mediation Act*,

The increased litigation does not in any way foreshadow the demise of mediation as an empowering consensual process. Nor does it refute the claim that mediation is “the better way.” Some increase in litigation by disappointed parties to mediations would be expected simply because of the substantial increase in the number of legal systems adopting mediation as a required part of the pre-trial process.<sup>12</sup> Nonetheless, increased litigation by dissatisfied mediation parties is not a good thing. Just as party satisfaction may be grounds for claiming the process is a good process, increased resort to the courts to provide relief from the fruits of a consensual mediation process may reflect a need to more closely scrutinize the process.

Although court-connected mediations are part of a highly structured litigation process that carefully spells out rights and duties through numerous rules of procedure, the mediation process has been largely unregulated. The mediation community has been effective in convincing the courts and regulators to keep their hands off the emerging ADR processes in order to maximize individual choice, creativity, flexibility, and of course, finality. A few jurisdictions provide specific direction usually crafted in facilitative language,<sup>13</sup> but typically mediators are given only general direction.<sup>14</sup> Courts simply hand off the case to privately retained mediators, asking them to be neutral and not coercive but to extract a settlement. Courts then draw a wall of confidentiality

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22 N. ILL. U. L. REV. 157, 157–58 (2002) (describing the history of the Uniform Mediation Act).

<sup>12</sup> For example, in 1999, Florida had approximately 125,000 court-connected mediations. Alfini & McCabe, *supra* note 10, at 172 n.4 (quoting Kimberly Ann Kosch, *Compendium of Florida-Court Sponsored Arbitration and Mediation Programs* (2000)).

<sup>13</sup> See N.C. STANDARDS OF PROF'L CONDUCT FOR MEDIATORS pmbl. (providing that “[t]he mediator’s role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute”); see also FLA. R. FOR CERT. AND APPOINTED MEDIATORS 10.310, which provides:

(a) Decision Making. Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting parties in reaching informed and voluntary decisions while protecting their right of self-determination. (b) Coercion Prohibited. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation. (c) Misrepresentation Prohibited. A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting mediation. (d) Postponement or Cancellation. If, for any reason, a party is unable to freely exercise self-determination, a mediator shall cancel or postpone a mediation.

*Id.*

<sup>14</sup> See, e.g., MINN. GEN. R. PRAC. 114.02(7) (providing that “[a] mediator may not impose his or her own judgment on the issue for that of the parties”).

around the process and hope the case goes away.<sup>15</sup> The mediator is free, within extremely broad limitations, "to work her magic"<sup>16</sup> on the participants, establish the rules of the process, and then to use these rules to trash, bash, or hash out a settlement.<sup>17</sup>

This Article advances the thesis that the number of recent cases and the nature of the claims by parties complaining about their experiences in court-connected mediations suggest that it is time to reassess the courts' role in supervising and regulating the mediation processes that judges have incorporated into the pre-trial process. The dissonance between the mediation community's aspirational goals for a conciliatory process and the judicial system's singular focus on settling cases has not assured a fair process.<sup>18</sup> The courts' reluctance to supervise the mediation process, for fear that it will become less efficient in getting rid of cases, creates a virtually unregulated enclave of adversarial activity within a process loosely defined as conciliatory and facilitative. This dissonance can create, and has created, both confusion and an unfair process.

The traditional method of policing the bargaining process through substantive contract law is not adequate to assure fair processes in court-connected mediations. Substantive contract principles were developed based on the model of private, adversarial negotiation, which is dramatically different from the context of conciliatory mediation. Therefore, substantive principles of contract law must recognize and accommodate the different context of the mediation process. In particular, the role of the court-appointed mediator, who controls the communications and engages in sophisticated techniques in an effort

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<sup>15</sup> See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 3 (1991) ("In short, courts may try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice.").

<sup>16</sup> See generally John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 7 (1997) (examining the "magic in mediation" in an attempt to determine the ethical limits of a mediator's use of deception to solve problems).

<sup>17</sup> See generally James J. Alfini, *Trashing, Bashing and Hashing it Out: Is This the End of Good Mediation?*, 19 FLA. ST. U. L. REV. 47, 66-72 (1991) (describing the range of accepted mediator styles by categories of mediators who trash, mediators who bash, and mediators who hash things out).

<sup>18</sup> See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 408 (1997) (noting that "the romantic days of ADR appear to be over . . . [rather than] its promise of flexibility, adaptability, and creativity, we now see the need for ethics, standards of practice and rules"). But see Lela Porter Love, *Mediation: The Romantic Days Continue*, 38 S. TEX. L. REV. 735, 743 (1997) (replying that "[t]he romantic days of mediation continue because of the paradigm it embodies; its underlying values and vision are as compelling and laden with potential as ever").

to convince the parties to drop their adversarial masks, makes the context of mediations unique. Finally, the penchant for confidentiality and secrecy, resulting in overlapping privilege rules, makes it difficult for parties to litigate claims of unfairness in the mediation process. Certainly, the courts should be open to those mediation participants who claim rights or defenses generated in court-sanctioned processes. Legitimate concerns about confidentiality or other bright-line rules should not totally deprive participants the opportunity to raise basic claims of unfair treatment.

Relying on lawsuits to police mediation practices, however, will not assure fair procedures in court-connected mediations. Courts must explicitly regulate and supervise the process as well as supervise the private citizens serving as court-appointed mediators. Initially, the courts need to be clear about the goal of the mediation process and work to insure that the mediators act in ways consistent with this goal.

In crafting the goals and ground rules for court-connected mediation, the courts must reconcile the judicial system's goals of efficient and fair resolution of disputes through a highly structured, adversary system with mediations' core values of conciliation, party empowerment, and voluntary self-determination.<sup>19</sup> All parties, as well as the mediator, should know what is expected of them at a court-connected mediation. The desire to win by seeking every permissible advantage through adversarial argument, persuasion, and intimidation is deeply imbedded in the hearts and minds of participants in the litigation process. If the courts actually intend to compel parties to act in a cooperative, facilitative manner in the midst of this adversarial contest, the courts' expectations must be clear, and effective methods must be established to retrain the thought processes, practices, and expectations of those who choose to, or are compelled to, participate in the Anglo-American civil trial process.<sup>20</sup> It is more realistic to design the process carefully, clearly delineating the expectations and limits of adversarial conduct.

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<sup>19</sup> See Alfani, *supra* note 17, at 75 (asking "[h]ow the goals and demands of a consensual, non-adversarial process can be reconciled with those of the highly adversarial context in which it is injected").

<sup>20</sup> Thumb screws, cattle prods, and electric shock therapy might be a bit harsh, but adversarial instincts will not easily be obliterated.

## II. ENFORCING MEDIATED SETTLEMENT AGREEMENTS

A. *Is Mediation a Step in the Adversary Process or an Alternative Approach to Resolving Disputes?*

When mediation participants resort to litigation to enforce “rights” derived from a mediation process created by the court system, the courts must confront the basic issue about the nature of this ADR process: Is dispute resolution in the context of a mediation sufficiently different from the context of private negotiation or a judicial settlement conference to justify different substantive rules relating to enforcement? While both adversarial negotiation and mediation processes resolve disputes, the essence of the mediation process is that the parties voluntarily determine their solution.<sup>21</sup> In judicial settlement conferences and private negotiations the parties also make choices concerning whether they will settle, but the context of these “negotiations” are dramatically different from mediations.

Academics have written volumes on the place of mediation in the dispute resolution spectrum.<sup>22</sup> Most agree that the process of mediation was designed as a very different alternative to adversarial dispute resolution. Certainly, the rapid growth of the ADR movement was fueled in large part by a rejection of the adversariness and inflexibility of the litigation process.<sup>23</sup> Courts and legislatures, on the other hand, have readily accepted mediation, not necessarily because of an interest in self-determination, but because cases settled with little effort or expense by the judicial system.<sup>24</sup> The overlapping interests in resolving disputes cemented the marriage between the ADR community and the judicial system, despite what might appear to be differing values.

Public officials looked to the ADR community to provide both the intellectual leadership and the language describing and prescribing the process.

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<sup>21</sup> See generally Welsh, *supra* note 10, at 3 (“Ethical codes for mediators describe party self-determination as the ‘fundamental principle of mediation.’”).

<sup>22</sup> See, e.g., Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation, The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71, 71–72 (1998); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 30 (1982); Leonard L. Riskin, *Understanding Mediator’s Orientations, Strategies and Tactics: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 11 (1996); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 985–86 (1997).

<sup>23</sup> See Welsh, *supra* note 10, at 15 (“Much of the support for mediation was rooted in dissatisfaction with the legal system’s perceived mistreatment of disputants.”); see also Menkel-Meadow, *supra* note 15, at 6 (describing the ADR movement as motivated by a concern that “dispute resolution should more fully involve the participants in disputes”).

<sup>24</sup> See Menkel-Meadow, *supra* note 15, at 3–13.



Of course, the process was described in facilitative, party-empowering terms. But in practice, the judicial system's bottom-line focus has prevailed in providing an expedient, rights-based process focused on settlement.<sup>25</sup> As the mediation process has become institutionalized, or perhaps even swallowed up in the machinery of adversarial justice, principles of flexibility, cooperation, and empowerment may have been compromised. Commentators have remarked that the mediation process in court-connected mediations has been "hijacked by lawyers."<sup>26</sup> This reflects a "tale of legal innovation co-opted,"<sup>27</sup> leading to nothing more than "a traditional bilateral negotiation session attended by a third party or a 'glorified' judicial settlement conference."<sup>28</sup>

### B. *Should Traditional Principles of Contract Law Be Applied to Mediation Settlements?*

The extent to which court-connected mediation is simply a traditional negotiation with a stranger present<sup>29</sup> or truly is an alternative process for resolving disputes becomes less of a theoretical question when the fruits of the process become the subject of additional conflict and litigation. If asked to enforce or reform an alleged agreement reached during mediation, the courts initially must determine what substantive legal principles should be applicable. If the mediation process is simply a private bargaining process, traditional contract principles applied to private negotiations should also be applied to settlements arrived at during mediation. However, if the process is an institutionalized part of the pre-trial litigation process, perhaps courts should take into account unique

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<sup>25</sup> See Samuel J. Imperati, *Mediator Practice Models: The Intersection of Ethics and Stylistic Practices in Mediation*, 33 WILLAMETTE L. REV. 703, 711 (1997):

The style most frequently acknowledged publically [sic] by mediators is the facilitative style. But the reality is that if mediators are actually practicing a form of mediation that is not facilitative, and if, in fact, it is more evaluative, then the profession of mediation is doing a disservice to the public by espousing one style while practicing another.

*Id.*

<sup>26</sup> Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 DISP. RESOL. MAG., Fall 1999, at 15.

<sup>27</sup> Menkel-Meadow, *supra* note 15, at 1.

<sup>28</sup> Nancy A. Welsh, *Making Deals in Court Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 788 (2001) (quoting John Bickerman, *Great Potential: The New Federal Law Provides Vehicle, If Local Courts Want to Do More on ADR*, 6 DISP. RESOL. MAG., Fall 1999, at 3, 5); see also Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 76 n.23; Hensler, *supra* note 26, at 15–17.

<sup>29</sup> See Welsh, *supra* note 28, at 796.

aspects of the court-mandated mediation process, in particular, the mediator's power to extract, facilitate, influence, or coerce agreement.

This issue frequently arises in the context of concerns about confidentiality. Courts, legislatures, and most commentators are quite willing to treat mediation differently from private negotiation when it comes to preserving privacy or confidentiality in mediations.<sup>30</sup> Privacy and confidentiality are highly valued preconditions to successful mediation practices. The concern for confidentiality in settlement negotiation is not unique to the mediation process. The confidentiality of private settlement agreements has long been protected by the courts.<sup>31</sup>

The evidence rules protecting the confidentiality of settlement negotiations, however, include numerous exceptions.<sup>32</sup> There is general agreement that these evidence exceptions, designed for arms-length bargaining discussions in adversarial sessions, do not provide adequate protection for discussions in mediation.<sup>33</sup> Legislatures,<sup>34</sup> rulemaking bodies,<sup>35</sup> and common law judges<sup>36</sup>

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<sup>30</sup> See generally Deason, *supra* note 10, at 38–42 (discussing legislative and rule making efforts to protect confidentiality in mediation).

<sup>31</sup> See FED. R. EVID. 408 (providing that offers of compromise and statements in compromise negotiations cannot be admitted into evidence).

<sup>32</sup> See *id.* (providing that statements made in settlement negotiations cannot be admitted in subsequent trials to prove liability, but could be offered for impeachment or bias).

<sup>33</sup> See, e.g., Richard Chernick, *Confidentiality in the Mediation Process*, CA13 A.L.I.-A.B.A. 603, Jan. 1996, at 606 (1996); Jonathan M. Hyman, *The Model Mediator Confidentiality Rule: A Commentary*, 12 SETON HALL LEGIS. J. 17 (1988); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, The Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 2–3; Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 13–14 (1995); Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS J. 1, 3–7 (1988); Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157, 164–65 (1994); Symposium, *Critical Issues in Alternative Dispute Resolution: Confidentiality in Mediation, An Annotated Bibliography*, 12 SETON HALL LEGIS. J. 57, 62 (1988). But see Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Procedures in Federal Court*, 60 LA. L. REV. 91, 102 (1999) (arguing that Federal Rule of Evidence 408 provides sufficient protection in mediations); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 36 (1986) (suggesting that with a minor amendment, Federal Rule of Evidence 408 provides adequate protection for confidentiality in mediation).

<sup>34</sup> See UNIF. MEDIATION ACT § 4, reporter's note, at 2(a) (2003) (discussing privilege granted in section 4(b) of the Uniform Mediation Act that prevents disclosure of certain information); SARAH R. COLE, ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 9:10 (2d ed. 2001) (discussing statutory confidentiality privileges); see also Deason, *supra* note 10, at 40 (listing statutes and concluding that “most states recognize the importance of mediation

agree that confidentiality concerns in mediations are more pressing than the concerns for confidentiality in private settlement negotiations, requiring more extensive protection and particularized rules.

When it comes to enforcing settlement agreements obtained in a mediation, however, there is a working assumption that mediated agreements should be treated no differently than settlements obtained by private negotiation, despite the differing contexts. Disputes over mediated settlement agreements clearly raise issues not present in private negotiations. Even under the view that a mediation is simply a negotiation with a stranger present, this “neutral stranger,” who is not part of the adversary dispute, must be accounted for. Some modification in the law relating to enforcing negotiated settlements must be implemented to account for the role and effective power the neutral has on the parties and the language of any agreement.<sup>37</sup> The neutral may be a stranger, but the mediator is not a “passive” observer and can have a dramatic influence on the shape and language of agreement.

As discussed in Part VII, mediators play major roles in orchestrating, facilitating, or influencing settlements. For example, mediators will use their status and their skills to encourage the parties to let down their adversarial guard and confide in the mediator. This unique role of the mediator as trusted confidant is largely responsible for the enhanced concern for confidentiality or privilege that has been readily accepted by legislators and rulemakers.<sup>38</sup> But when the issue is enforcement of agreements, courts, legislators, and commentators tend to disagree about whether mediation settlement agreements should be treated differently from settlement agreements reached through bilateral negotiation.

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confidentiality and have enacted some form of protection”).

<sup>35</sup> See, e.g., MINN. GEN. R. PRAC. 114.08(a) (2002) (providing a broad privilege for “any fact” concerning the process).

<sup>36</sup> See, e.g., *NLRB v. Macaluso*, 618 F.2d 51, 51–54 (9th Cir. 1980) (finding a public policy justification for precluding a federal mediation and conciliation service mediator from testifying in a labor dispute); *Sheldone v. Pa. Tpk. Comm’n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000); *Sonenshtahl v. L.E.L.S. Inc.*, 372 N.W.2d 1, 6–7 (Minn. Ct. App. 1985) (applying a common law mediation privilege based on the policy of an enacted statute that was not yet in effect).

<sup>37</sup> For example, as a general principle of contract construction, ambiguous language is construed against the drafter. Traditional rules of interpretation must be modified when the mediator drafts the agreement or suggests the language that is adopted.

<sup>38</sup> See Robert A. Baruch Bush, *What Do We Need a Mediator For?: Mediation’s “Value-added” for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 3–6 (1996) (discussing how a mediated settlement negotiation differs from private negotiations).

## III. JUDICIAL APPROACH

## A. Contract Law Applied to Mediation Settlements

Judges uniformly agree, usually without discussion, that the basic principles of contract law should be applicable to disputes involving the enforcement of mediation agreements.<sup>39</sup> *Sponga v. Warro*<sup>40</sup> is one of the few cases to discuss the issue of whether the context of mediation requires special consideration in cases enforcing a settlement agreement. In *Sponga*, the Florida District Court of Appeals found that the interest in finality justified a heavier burden on a party arguing that unilateral mistake should negate a settlement reached in mediation.<sup>41</sup> The court reasoned that mediation, like arbitration, has a strong emphasis on finality.<sup>42</sup> According to the court, this interest in finality makes mediations “especially unsuited for the liberal application of a rule allowing rescission of a settlement agreement based on unilateral mistake.”<sup>43</sup>

Comparing the conciliatory mediation process to arbitration is unusual, as is the focus on finality in mediation. The court said nothing about the interests of self-determination. Clearly this court was looking at mediation through the lens of the litigation system.

In *Kaiser Foundation Health Plan of the Northwest v. Doe*,<sup>44</sup> the Oregon Court of Appeals reviewed a holding that settlements reached in mediations merited special consideration.<sup>45</sup> The trial judge viewed the issue from the

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<sup>39</sup> See *Strategic Staff Mgmt., Inc. v. Roseland*, 619 N.W.2d 230, 233–36 (Neb. 2000) (treating a purported mediated settlement agreement as a contract); *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001) (applying contract principles to a mediated settlement agreement), *reh'g denied*, 553 S.E.2d 36 (N.C. 2001); *Golding v. Floyd*, 539 S.E.2d 735–38 (Va. 2001) (applying contract principles of construction to a mediated settlement agreement memorandum); *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 39 (Va. 1995) (applying contract law to determine whether a mediation memorandum of agreement was enforceable).

<sup>40</sup> *Sponga v. Warro*, 698 So.2d 621, 625 (Fla. Dist. Ct. App. 1997); *see also* *Tilden Groves Holding Corp. v. Orlando/Orange County Expressway*, 816 So. 2d 658, 660 (Fla. Dist. Ct. App. 2002) (“There is a more stringent standard of review, however, when the final judgment to be vacated follows a mediated settlement agreement.”); *Wright v. Brockett*, 571 N.Y.S.2d 660, 665 (N.Y. Sup. Ct. 1991) (refusing to enforce a mediated settlement agreement between an unrepresented tenant and landlord absent a showing it was not coerced borrowing procedures followed in housing court).

<sup>41</sup> *Sponga*, 698 So. 2d at 625.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Kaiser Found. Health Plan v. Doe*, 903 P.2d 375, 378 (Or. Ct. App. 1995), *modified by*, 908 P.2d 850 (Or. Ct. App. 1996).

<sup>45</sup> *Id.* at 378.

perspective of mediation's core value of self-determination, rather than from the adversary system's interest in finality. Therefore, the judge refused to enforce a settlement agreement that was signed by defendant's lawyer with full authorization from the defendant,<sup>46</sup> because "the process of mediation is bottomed on the premise of voluntariness."<sup>47</sup> Consequently, standard contract law was inapplicable and any mediation agreement should not be binding until reduced to writing, agreed upon, and signed by the parties.<sup>48</sup>

The Oregon Court of Appeals disagreed, however, stating that there is "no authority that supports the proposition that settlements reached during mediation should receive special treatment or be analyzed differently from settlements reached in other settings."<sup>49</sup> The court applied standard contract law coupled with traditional agency rules to bind the defendant to this contract signed by his lawyer.<sup>50</sup> Again, this court appeared unconcerned about mediation's core value of self-determination.

The Oregon Court of Appeals was correct in its assessment of the status of the law. For example, each of the state supreme courts that have addressed enforcement issues have applied, without discussion, general contract law principles.<sup>51</sup> However, the Oregon trial judge is also correct that the mediation process, aimed at "voluntariness" or self-determination, raises different concerns from traditional contract principles that focus on objective manifestation of assent, community standards, and finality.

### B. *Objective Manifestation of Agreement vs. Self-Determined Agreement*

Under traditional contract law principles, agreements reached in mediation are enforceable if there is mutual assent about the material terms of the agreement. Mutual assent is sometimes expressed in terms of a "meeting of the minds,"<sup>52</sup> which sounds like a subjective inquiry into what the parties actually intended. Traditional contract law however, requires an objective inquiry to determine whether the communications and actions of the parties *manifested*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Kaiser*, 903 P.2d at 378.

<sup>50</sup> *Id.* at 378–83.

<sup>51</sup> See *supra* note 9.

<sup>52</sup> *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001) (stating that "for an agreement to constitute a valid contract, the parties' 'minds must meet as to all the terms'") (citation omitted), *reh'g denied*, 553 S.E.2d 36 (N.C. 2001); *Riner v. Newbraugh* 563 S.E.2d 802, 804 (W.Va. 2002) (stating that "a meeting of the minds of the parties is the *sine qua non* of all contracts").

mutual assent.<sup>53</sup> The “making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.”<sup>54</sup>

The parties do not have to reach explicit agreement on all terms, but the essential terms of the contract must be reasonably certain. “The terms of the contract are reasonably certain if they provide a basis for determining . . . the existence of a breach and for giving an appropriate remedy.”<sup>55</sup> If the court is satisfied that the parties manifested an intent to be bound, the court can provide the terms of contract. Under the authority and influences of the Uniform Commercial Code<sup>56</sup> most gaps in the terms of an agreement, other than quantity,<sup>57</sup> can be filled by the court by reference to course of performance, course of dealings, usage of trade, and commercial reasonableness.<sup>58</sup> Furthermore, once a contract is entered into, it will not be set aside absent a showing of fraud, misrepresentation, mistake, duress, or undue influence.<sup>59</sup>

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<sup>53</sup> See E. ALLEN FARNSWORTH, *CONTRACTS* § 3.6 (3d ed. 1999).

<sup>54</sup> *Grimsley v. Inverrary Resort Hotel*, 748 So. 2d 299, 301 (Fla. Dist. Ct. App. 2000) (quoting *Robbie v. Miami*, 469 So. 2d 1384, 1385 (Fla. 1985)); see also *Computer Network v. Purcell Tire & Rubber Co.*, 747 S.W.2d 669, 675 (Mo. Ct. App. 1988) (stating that “while a few cases . . . speak in terms of ‘meeting of the minds’ . . . the actual holdings are consistent with the theory of objective manifestation of assent”).

<sup>55</sup> *Weddington Prods., Inc. v. Flick*, 71 Cal. Rptr. 2d 265, 277 (Cal. Ct. App. 1998) (quoting *RESTATEMENT (SECOND) OF CONTRACTS* § 33 (1981)).

<sup>56</sup> See U.C.C. § 2-208 (2000). Under the revised Uniform Commercial Code however, the substance of this provision is found in section 1-303 (2003).

<sup>57</sup> See U.C.C. § 2-204 (2002) cmt. subsection 3, which provides:

If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy based on commercial standards of indefiniteness. Neither certainty for what the parties were to do nor a finding of the exact amount of damages is required. Neither is the fact that one or more terms are left to be agreed upon enough by itself to defeat an otherwise adequate agreement. This Act makes provision elsewhere for missing terms needed for performance, open price, remedies and the like.

*Id.*; see also *RESTATEMENT (SECOND) OF CONTRACTS* § 33 (1981).

<sup>58</sup> See, e.g., U.C.C. § 2-305 (2003) (supplying a “reasonable price” when there is an open price term); U.C.C. § 2-309(1) (2003) (supplying a “reasonable time” when there is no time for performance specified).

<sup>59</sup> See *RESTATEMENT (SECOND) OF CONTRACTS* § 7 (1981); see also *Coulter v. Carewell Corp.*, 21 P.3d 1078, 1082 (Okla. Civ. App. 2001) (stating that “a settlement agreement ‘constitutes a contract between the parties which should not be set aside absent fraud, duress, undue influence, or mistake’”) (quoting *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196, 1198 (Okla. Civ. App. 1998)).

Settlements derived from mediations are treated the same as negotiated settlement agreements.<sup>60</sup> Of course, within the framework of general contract law, settlement contracts receive special treatment by the courts. Because settlements conserve resources and make less work for the courts, they are highly favored by judges.<sup>61</sup> Perhaps some judges favor settlements to encourage self-determination by the parties, but rarely is this cited as a reason for enforcing settlements.<sup>62</sup> Consequently, there is a type of presumption that assumes the validity and enforceability of settlement agreements ending litigation.<sup>63</sup> This presumption of validity is applicable to settlements derived from mediations as well.<sup>64</sup> Parties claiming that a purported settlement agreement should not be enforced have an uphill battle. Furthermore, settlement agreements in court-connected mediations frequently become part of a court order or judgment.<sup>65</sup> Seeking relief from, or enforcement of, a court order or judgment raises substantive and procedural issues that may not be present in most contractual litigation. Many courts have summary procedures in place for the enforcement of settlement agreements in litigated cases.<sup>66</sup> Finally, a likely remedy for breach of a

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<sup>60</sup> See, e.g., W.VA. TRIAL CT. R. 25.14 (providing that a written mediation settlement agreement is enforceable in the same manner as a written contract).

<sup>61</sup> See *Robbie v. Miami*, 469 So. 2d 1384, 1385 (Fla. 1985) (stating that settlements are highly favored and will be enforced wherever possible).

<sup>62</sup> But see *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001), *reh'g denied*, 553 S.E.2d 36 (N.C. 2001). The court stated:

[W]e recognize that settlement of claims is favored in the law, . . . and that mediated settlement as a means to resolve disputes should be encouraged and afforded great deference . . . [but] given the consensual nature of any settlement, a court cannot compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement.

*Id.* (citation omitted); *Riner v. Newbraugh*, 563 S.E.2d 802, 809–10 (W. Va. 2002) (agreeing that the law “favors and encourages settlement,” but should only enforce agreements that are “fairly made and not in contravention of some law or public policy”).

<sup>63</sup> See, e.g., *In re Ames*, 860 S.W.2d 590, 592–93 (Tex. App. 1993) (enforcing a repudiated settlement agreement extracted during a mediation in the face of a statute that seemed to allow for repudiation).

<sup>64</sup> *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 39 (Va. 1995) (noting that “the law favors compromise and settlement of disputed claims”) (quoting *Bangor-Punta Operations, Inc. v. Atlanta Leasing, Ltd.*, 207 S.E.2d 858, 860 (Va. 1974)).

<sup>65</sup> See, e.g., IND. ALTERNATIVE DISP. RESOL. R. 2.7 (E)(2) (providing that mediated settlements be reduced to writing, signed, and filed with the court along with a stipulation of disposition); see also TEX. R. CIV. P. 11; W. VA. TRIAL CT. R. 25.14.

<sup>66</sup> See COLE, ET AL., *supra* note 34, § 4-13 (discussing provisions for summary enforcement); Gregory Firestone, *An Analysis of Principled Advocacy in the Development of The Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265, 270 (2002) (discussing provisions for summary enforcement of mediated settlements in early versions of the Uniform

settlement agreement is specific performance, where in a typical contract action the norm is an award of expectation or actual damages.

While the substantive principles of contract law may distinguish between settlement agreements and other contracts, usually no distinction is made between mediated settlements and negotiated settlements. Applying contract formation principles developed in the context of adversarial, arms-length bargaining to the consensual mediation process creates some difficulty for the courts. Searching for an objective manifestation of mutual assent in a process designed for facilitation and self-determination can result in separate trips in the same journey.

### *C. Agreements, Agreements to Agree, or No Agreement at All*

Whether an agreement in fact has been reached is the most common issue in the cases addressing enforcement of mediation settlement agreements. These cases raise two related but separate questions that tend to get jumbled together. First, did the parties manifest an intent to agree; second, is the agreement sufficiently definite that the terms can be enforced by a court? The issues overlap, of course, because the lack of definite terms may be objective evidence that the parties did not yet intend to be bound.<sup>67</sup>

These issues are particularly difficult for a court to resolve when the alleged agreement is oral, and the parties have no tangible, executed writing to show to the court. Rather than focus on the written language, the trial judge must work through conflicting testimony with differing recollections of what was said. Even where a writing is produced, courts have difficulty determining whether an agreement was reached absent an examination of the context of the negotiation. The writing may reflect only a preliminary agreement or an agreement on only some of the material terms. Frequently, parties sign documents contemplating additional negotiation and a more formal draft of an agreement that would not be binding until subsequently considered, agreed upon, and executed by the parties.

For example, in *Chappell v. Roth*,<sup>68</sup> the parties agreed in writing to a specific dollar amount in exchange for a voluntary dismissal with prejudice and a "full and complete release, mutually agreeable to both parties."<sup>69</sup> When the defendant subsequently insisted on a "hold harmless" clause in the release, plaintiff refused.

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Mediation Act); see also *Raphael v. Raphael*, 817 So.2d 462, 465 (La. Ct. App. 2002) (enforcing mediated settlement agreement by summary proceedings).

<sup>67</sup> FARNSWORTH, *supra* note 53, §§ 3.7, 3.8.

<sup>68</sup> *Chappell v. Roth*, 548 S.E.2d 499, 500 (N.C. 2001), *reh'g denied*, 553 S.E.2d 36 (N.C. 2001).

<sup>69</sup> *Id.*



After substantial litigation, the North Carolina Supreme Court ruled that the parties had not agreed on all the material terms.<sup>70</sup>

Courts apply general contract law principles that distinguish between valid mediated settlement agreements that contemplate a subsequent formal writing to memorialize the agreement and tentative agreements that are “subject to” executing a subsequent writing.<sup>71</sup> In *Snyder-Falkinham v. Stockburger*,<sup>72</sup> the Virginia Supreme Court enforced a mediated settlement that was initially agreed to by the plaintiff, who subsequently refused to sign the formal settlement papers.<sup>73</sup> But in *Golding v. Floyd*,<sup>74</sup> the Virginia Supreme Court refused to enforce a signed written “Settlement Agreement Memorandum” that was expressly made “subject to” the execution of a formal agreement.<sup>75</sup>

The proof problems associated with this issue are not unique to the mediation context. The agreement to agree raises difficult factual and legal issues in the context of non-mediated negotiations as well. Because of the consensual nature of the mediation process, the unique role of the mediator, and the added privilege issues limiting access to proof, these issues are extremely difficult to resolve fairly in the context of mediations.

The West Virginia Supreme Court struggled with these issues in *Riner v. Newbraugh*.<sup>76</sup> After an “unsuccessful mediation conference,”<sup>77</sup> the parties and

<sup>70</sup> *Id.*

<sup>71</sup> See *Inwood Intern. Co. v. Wal-Mart Stores, Inc.*, 243 F.3d 567, 2000 WL 1720676 at \*5 n.3 (Fed. Cir. Nov. 17, 2000) (unpublished) (enforcing a mediated settlement agreement that contemplated subsequent formal documents and releases); *Berland v. Miller*, No. A099061, 2003 WL 1875463, at \*5 (Cal. Ct. App. Apr. 15, 2003) (enforcing a “Full Settlement” agreement that contemplated a subsequent signing of “a more complete agreement”); *In re Estate of Knopf v. Knopf*, No. 238377, 2003 WL 356430, at \*2 (Mich. Ct. App. 2002) (enforcing a settlement agreement that contemplated a subsequent “comprehensive” agreement being drafted); *Lee v. Rosen, Newey & Von Blon*, No. 14-00-00759-CV, 2002 WL 1953791, at \*3 (Tex. App. Aug. 22, 2002) (enforcing a mediated settlement agreement that contemplated future delivery and execution of formal settlement documents but was not made “subject to” the execution of these documents); *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 261 (Tex. App. 2002) (concluding that the jury could find an agreement was reached despite the parties contemplating future negotiations and a more formal agreement).

<sup>72</sup> *Snyder-Falkinham v. Stockburger*, 457 S.E.2d 36, 40–41 (Va. 1995); see also *Strategic Staff Mgmt., Inc. v. Roseland*, 619 N.W.2d 230, 235 (Neb. 2000) (enforcing a memorandum settlement agreement that contemplated executing subsequent settlement documents).

<sup>73</sup> *Snyder-Falkinham*, 457 S.E.2d, at 40–41.

<sup>74</sup> *Golding v. Floyd*, 539 S.E.2d 735, 738 (Va. 2001).

<sup>75</sup> *Id.*

<sup>76</sup> *Riner v. Newbraugh*, 563 S.E.2d 802, 805–06 (W.Va. 2002).

<sup>77</sup> *Id.* at 804. Because no settlement was reached the court characterized the mediation

the mediator followed up the mediation with subsequent telephone conversations.<sup>78</sup> Eventually the mediator believed the parties reached an agreement and drafted a Mediation Settlement Agreement.<sup>79</sup> The mediator signed the agreement as did the Riners.<sup>80</sup> Newbraugh subsequently refused to sign and drafted a more detailed agreement. When the Riners refused to sign the more detailed agreement, Newbraugh brought a motion to enforce the settlement agreement.<sup>81</sup> After two hearings involving extensive mediator testimony, the trial judge ordered the Riners to sign Newbraugh's agreement.<sup>82</sup>

Despite the mediator's testimony that the parties agreed to this settlement, the West Virginia Supreme Court reversed.<sup>83</sup> The court recognized that oral settlement agreements were enforceable, but concluded that there was no "meeting of the minds" as to material terms in this case.<sup>84</sup> The court expressed concern about the mediator testifying, but suggested that mediators could testify on the issues of whether an agreement had been reached as well as its terms, without disclosing "confidential" information.<sup>85</sup>

*Riner* is a prime example of how the consensual process of mediation, designed to reduce conflict, can create conflict, add expense to the process, and strain the courts' ability to provide a fair resolution. In addition to typical evidentiary issues about the negotiation, mediations are draped in layers of confidentiality and privilege rules.<sup>86</sup> Before addressing the merits of any claim that an agreement was reached, courts and parties must confront these ambiguous and frequently inconsistent rules of privilege and confidentiality to determine

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conference as unsuccessful. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 805.

<sup>80</sup> *Id.*

<sup>81</sup> *Riner*, 563 S.E.2d at 805.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 809.

<sup>85</sup> *Id.* at 808-09.

<sup>86</sup> See Deason, *supra* note 10, at 38:

Almost all jurisdictions recognize the importance of confidentiality for mediation, even though it is protected to varying degrees. Some of these protections are incorporated into state evidentiary rules; others are found in statutes that govern mediation. There is also an abundance of state rules and statutes limited to court annexed mediation or designed for particular mediation programs that protect confidentiality.

*Id.*

what evidence is available about the context and content of the alleged agreement.<sup>87</sup>

Asking a court to enforce a mediated settlement agreement raises other problems not necessarily present in private contract disputes. In most contractual disputes, past dealings, trade usage, and part performance tend to shed light on the legal relationship created by oral or written exchanges. When disputes arise about whether a matter was settled in court-connected mediation, the alleged agreements tend to be wholly executory and often with little past experience between the parties to provide guidance in interpretation. Further, gaps in agreements between parties in the community are readily filled by imposing reasonable terms, through course of performance, course of dealing, usage of trade, or custom.<sup>88</sup> Applying community or reasonable standards in contract settings reflects a view that a judicially-imposed resolution consistent with external community standards is acceptable. However, imposing external community standards in a mediation setting conflicts with mediation's promise of self-determination. In theory, parties to a mediation should be free to decide for themselves what type of agreement is acceptable, free from constraining community standards.<sup>89</sup>

#### *D. Duress/Undue Influence—Mediation Style*

Mediation participants are complaining to the courts about unfairness in the mediation process, raising traditional contract defenses based on fraud, misrepresentation, or duress. A disturbing aspect of this trend is the number of

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<sup>87</sup> Philip J. Harter, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, 22 N. ILL. U. L. REV. 251, 251 (2002) (stating that "[t]he law governing the confidentiality of mediation is currently a mess"). Although the stated purpose of the Uniform Mediation Act is to "create uniform rules to increase predictability, simplicity and self-determination," the focus of the act is on secrecy and privilege. UNIF. MEDIATION ACT prefatory note (2003). Privilege rules make it more difficult for courts to resolve subsequent conflict accurately and fairly, thus sacrificing self-determination in some cases to advance other policy considerations considered more valuable. See generally Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 23 (2001) (arguing that the drafters of the act favored mediator confidentiality over self-determination).

<sup>88</sup> See *supra* notes 56–59 and accompanying text.

<sup>89</sup> See Love, *supra* note 18, at 740 (noting that in mediation, "the values, preferences, and priorities of the parties should govern the outcome . . . in sharp contrast to an outcome which reflects the likely court ruling, societal norms, or the neutral assessment of a fair or just result"). But see Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 J. Disp. Resol. 347, 368 (suggesting that in evaluating fairness of a mediated settlement, "[t]he benchmark . . . is whether the agreement approximates or improves upon the probable adjudicated outcome").

claims focusing on the mediator as the source of unfairness. To some extent, these claims of mediator unfairness may be encouraged by the confidentiality and privilege rules that tend to be much looser when the mediator is accused of wrongdoing.<sup>90</sup> If there is a claim the mediator participated in unfairness, mediator testimony becomes central to the fair resolution of the dispute. In a caucus-based mediation, where the communications are channeled through the mediator, what the mediator said or represented on behalf of the other party is essential to determining whether the agreement was entered into fairly.

Recent cases raise concerns about the proper practice for mediators. The increase in the number of litigated cases may reflect more aggressive tactics by neutrals as mediators become more intensely involved in extracting a settlement. Many of the duress cases involve allegations of dire predictions or “threats” by the mediator about the consequences of not entering into a settlement immediately.<sup>91</sup> Of course, a mediator should not “threaten” a party or “coerce” a settlement, but there is continuing debate and controversy about the extent to

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<sup>90</sup> See *McKinlay v. McKinlay*, 648 So. 2d 806, 809–10 (Fla. Dist. Ct. App. 1995) (ruling that the claim that the mediator pressured a party into signing the agreement waived the mediator privilege); see also UNIF. MEDIATION ACT § 6(a)(5) (2003) (providing an exception to the privilege rules for claims of professional misconduct against the mediator); Hughes, *supra* note 87, at 67 (predicting that lawyers will choose to join mediators as parties to get around the privilege limitations in the Uniform Mediation Act).

<sup>91</sup> Florida set up a forum to hear complaints about mediator misconduct and discovered that parties were unhappy with perceived aggressive mediator tactics crossing the line from providing information and “pointing out” possible outcomes to threats and coercion. See Welsh, *supra* note 10, at 37 n.153 (describing specific cases before the Florida Mediator Qualifications Board); see also Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949, 963 (1997) (suggesting that mediators avoid evaluative behaviors). Florida’s court rules allowed mediators to “point out” possible outcomes of the case but “under no circumstances . . . offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.” FLA. CT. MEDIATION R. 10.090(d) (1992) (repealed 2000). The Florida rules were amended to allow mediators to provide information if the mediator is qualified by training and experience to point out possible outcomes and discuss the merits of a claim, but not to predict how the court will resolve the dispute. *Id.* at 10.370(a), (c) (2003). The mediator must maintain impartiality and self-determination. *Id.* The rules also require the mediator to advise the parties of their right to seek counsel when the mediator believes a party does not understand their rights. *Id.* at 10.370(b) (2003); see also Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 279–82 (2001) (addressing the Florida experience); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida’s Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 702 (1994) (same).

which mediators should offer information, opinions, or predictions.<sup>92</sup> While scholars debate the issues, the subtle differences between offering information, giving opinions, evaluating, predicting, influencing, threatening, and coercing may be lost on the parties, and perhaps poorly understood by many mediators. The unwanted evaluations in these cases tend to be combined with procedural concerns, usually through extended sessions that have the effect, if not the intent, of wearing down the will to resist.

Some of the cases suggest that a mediator's zeal to extract a settlement creates an insensitivity to obvious health concerns. For example, in the now-famous California case *Olam v. Congress Mortgage Co.*,<sup>93</sup> the mediation began between 9:00 and 10:00 A.M. and lasted until an agreement was signed between midnight and 1:00 A.M. the next morning.<sup>94</sup> Ms. Olam, a sixty-five year old woman, suffered from high blood pressure, headaches, and intestinal pains.<sup>95</sup> She claimed to be upset because she was excluded from participating in most of the mediation.<sup>96</sup> Both her lawyer and the mediator predicted that if she went to trial, she might lose her house with no chance to get it back.<sup>97</sup> She settled.<sup>98</sup> When Ms. Olam tried to set aside the agreement on several grounds, including undue influence, the magistrate concluded she did not state a prima facie case justifying relief.<sup>99</sup>

In *Vitakis-Valchine v. Valchine*,<sup>100</sup> plaintiff sought to set aside a mediation settlement agreement reached after an eight-hour mediation session.<sup>101</sup> The plaintiff maintained that the mediator threatened to tell the judge that she caused the settlement failure. The mediator also gave legal opinions, including a

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<sup>92</sup> Compare Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997) (arguing that giving advice, making assessments, stating opinions, proposing a fair or workable solution, or pressing parties to accept a particular position is "inconsistent" with the role of the mediator) with James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals*, 77 from an Evaluative Lawyer Mediator, 38 S. TEX. L. REV. 769, 784-85 (1997) (concluding that the distinction between giving legal information and legal advice is not a useful one for lawyer mediators). See generally Levin, *supra* note 91, at 271-86 (addressing practices and court rules attempting to distinguish proper from improper opinions of mediators).

<sup>93</sup> *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1151 (N.D. Cal. 1999).

<sup>94</sup> *Id.* at 1142, 1144.

<sup>95</sup> *Id.* at 1142.

<sup>96</sup> *Id.* at 1142-44.

<sup>97</sup> *Id.* at 1143-44.

<sup>98</sup> *Id.* at 1144.

<sup>99</sup> *Olam*, 68 F. Supp. 2d at 1144.

<sup>100</sup> *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1094 (Fla. Dist. Ct. App. 2001).

<sup>101</sup> *Id.* at 1096.

prediction that the court would rule against her, opinions about the affect on pensions, and her potential legal costs.<sup>102</sup> The court ruled that these allegations, if proven at trial, would be grounds to set aside the agreement.<sup>103</sup>

In *Randle v. Mid Gulf*,<sup>104</sup> the appellant, who was on heart medicine, tried to set aside a mediation settlement agreement by claiming that despite chest pains and fatigue, he was told that he would have to continue in the mediation session until he was willing to reach agreement.<sup>105</sup> The court concluded that these allegations created a fact issue for the jury.<sup>106</sup>

In *Golden v. Hood*,<sup>107</sup> plaintiff asked to set aside a mediation agreement signed by plaintiff, defendant, attorneys for both parties, and the mediator.<sup>108</sup> Plaintiff, who was suffering from depression related to the accident in question, maintained that his psychological state made him susceptible to duress and misrepresentation.<sup>109</sup> He maintained that his lawyer, the defendant's lawyer, and the mediator all ganged up on him, insisting that he would get only a limited recovery at trial.<sup>110</sup> His attorney threatened to resign if he did not accept the settlement.<sup>111</sup> Although the court concluded that plaintiff's allegations did not establish a prima facie claim of duress, it analyzed the alleged predictions under a misrepresentation theory.<sup>112</sup> Ultimately, the court concluded that the trial predictions were not inaccurate, they were not "false assertions," and the settlement was fair.<sup>113</sup>

These cases make it difficult for the courts to provide a fair resolution to issues created in processes the courts endorse but rarely supervise or examine. In court-connected mediations, the parties are participating in a public, highly-regulated, adversarial process presided over by a judicial officer responsible to the public. The parties are then asked or forced to participate in a private, largely-

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<sup>102</sup> *Id.* at 1097.

<sup>103</sup> *Id.* at 1099-1100.

<sup>104</sup> *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at \*2 (Tex. App. Aug. 8, 1996).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Golden v. Hood*, No. E1999-02443-COA-MR3-CV, 2000 WL 122195, at \*1 (Tenn. Ct. App. Jan. 26, 2000).

<sup>108</sup> *Id.* at \*1.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; see also *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196, 1199 (Okla. Civ. App. 1998) (enforcing a mediated settlement agreement despite claims that the agreement was the result of threats and lies by the mediator, the third party, and the plaintiff's attorney).

<sup>111</sup> *Golden*, 2000 WL 122195, at \*2.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

unregulated, consensual process, usually presided over by private citizens or lawyers essentially responsible to no one.<sup>114</sup>

Resolving the issues created in these conflicting and confusing processes by resorting to traditional contract theory is difficult. For example, a mediation is a consensual process where parties should make decisions free from coercion and pressure. However, traditional contract analysis tolerates a fair amount of “bargaining pressure” from the parties before courts are willing to upset an apparent agreement, particularly an agreement settling a litigated dispute.<sup>115</sup> To avoid an agreement on the grounds of duress, the proponent must establish a wrongful threat that deprived the party of free choice.<sup>116</sup> If the claim is economic duress, courts use an objective test: whether there was a reasonable alternative to giving in to the wrongful threat.<sup>117</sup> Finally, courts will grant relief only where there is some unfairness in the result or some type of unjust enrichment.<sup>118</sup> These concepts, developed in the context of bilateral bargaining relationships, are not easily adapted to a mediation process that is premised on self-determination, not a manifestation of assent.<sup>119</sup> Furthermore, the law of duress was not developed in the context of neutrals trained and motivated to influence parties to reach agreement.

Because most mediations are private, it is difficult to determine what goes on behind the closed doors. However, a few court decisions have reported wrongful threats in mediation. For example, parties have complained about threats of criminal prosecution to coerce a one-sided settlement.<sup>120</sup> In *Randle*, the plaintiff

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<sup>114</sup> In some jurisdictions, fledgling ethical boards are attempting to regulate mediator behavior. See *supra* note 91 for a description of the Florida experience. In egregious cases, appeals to the court might result in relief to the parties.

<sup>115</sup> See Welsh, *supra* note 10, at 68–79 (discussing settlements obtained by coercive practices in judicial settlement conferences).

<sup>116</sup> JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 28.2, at 40 (rev. ed. 2002); see RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981); see also *Advantage Properties, Inc. v. Commerce Bank*, 242 F.3d 387, 2000 WL 1694071, at \*4 (10th Cir. 2000) (unpublished table decision) (stating that under Kansas law there must be a wrongful act or threat that obtains consent without volition).

<sup>117</sup> See PERILLO, *supra* note 116, § 28.2, at 41.

<sup>118</sup> *Id.* at 42.

<sup>119</sup> See Love, *supra* note 18, at 738 (maintaining that mediation, which is premised on facilitation and self-determination, belongs in a different paradigm from adjudication); see also Welsh, *supra* note 10, at 59–60 (arguing that mediation’s concept of self-determination contemplates voluntary party participation and is different from contract law’s focus on free will assent).

<sup>120</sup> See, e.g., *Cooper v. Austin*, 750 So. 2d 711, 713 (Fla. Dist. Ct. App. 2000) (holding that a spouse’s threat to have her husband arrested if he did not agree to what appeared to the court to be an unequal property settlement was grounds for setting aside the agreement). But

claimed duress when the mediator would not let him leave without settling the case, despite chest pain.<sup>121</sup> In most of the reported cases raising issues of duress, however, the party is complaining more about predictions involving how a judge or jury might decide a case or the implications to a party if they lost at trial.<sup>122</sup> These predictions or evaluations could hardly be deemed to be a wrongful threat under traditional contract analysis.

The concept of wrongfulness may come into play when the prediction comes from, or is endorsed by, the mediator. Many commentators have argued that it is improper for mediators to provide opinions about what might happen in court and that mediators should not be involved in evaluations of the participants' legal cases.<sup>123</sup> In theory, some court rules support this concept of mediation.<sup>124</sup> In jurisdictions with well-developed rules regulating mediators, the predictions or threats become wrongful if they violate mediator conduct standards.<sup>125</sup> In most jurisdictions, the standards for mediator conduct are so vague that it might be impossible to tell if they were violated. But even if a court would agree that a mediator's evaluation is a "wrongful threat" because it violates mediator conduct standards, that does not make out a case for avoiding a contract based on duress.

Under duress analysis, the court must focus on whether the wrongful threat left the party with a reasonable alternative, such as actually proceeding to trial. Although the driving force behind the ADR movement may be to avoid a trial, it would be unusual for a court to conclude that a party accepted a settlement offer

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*cf.* *FDIC v. White*, 76 F. Supp. 2d 736, 739 (N.D. Tex. 1999) (finding no duress caused by reference to criminal implications when the matter had already been referred for prosecution by other government agencies and the mediator simply raised the matter for discussion).

<sup>121</sup> *Randle v. Mid Gulf, Inc.*, No. 14-95-01292-CV, 1996 WL 447954, at \*2 (Tex. App. Aug. 8, 1996).

<sup>122</sup> See Hensler, *supra* note 4, at 98 (criticizing the mediator technique of reciting a "parade of horrors" about the trial process designed to "[wear] down parties' resistance to settling").

<sup>123</sup> See *supra* notes 91-92.

<sup>124</sup> See, e.g., FLA. CT. MEDIATION. R. 10.370(c):

Consistent with standards of impartiality and preserving party self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

*Id.*; N.C. PROF'L. COND. MEDIATORS R. 5(B) ("[A] mediator may make suggestions for the parties' consideration. However at no time shall a mediator make a decision for the parties, or express an opinion about or advise for the parties, or express an opinion about or advice for or against any proposal under consideration.").

<sup>125</sup> See *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, 1095 (Fla. Dist. Ct. App. 2001) (addressing the issue of allegedly improper trial predictions by the mediator under a theory of mediator misconduct and violation of court rules governing mediator conduct).



because the alternative of going to court and participating in a fair trial is an unreasonable alternative.<sup>126</sup> Finally, the court must also assess whether the threat resulted in unjust enrichment or an unfair bargain.<sup>127</sup> If the actual settlement is within the broad range of reasonable settlements, the settlement should be upheld under contract theory, even if exacted by coercive pressure.

The traditional duress defense does not account for the role of the mediator. If the alleged wrongful threat comes from a third-party like a mediator, traditional contract law provides that the agreement is not voidable if the other party to the transaction acted in good faith, had no reason to know of the coercive threats, and gave value to, or relied materially on, the transaction.<sup>128</sup> If the mediator wrongfully threatens one party in a private caucus, the other party may not ever know about the wrongful threat. Thus, a mediator may threaten improperly or manipulate a party's interests in self-determination, yet there is no relief under traditional principles of duress unless the adverse party can be tied to the misconduct.

The context of a mediation creates an atmosphere where parties may be vulnerable to coercive pressures, particularly when the party's attorney wants the client to settle. Attorneys who cannot convince their clients to accept a settlement that they believe is reasonable frequently seek out a mediator to serve as a "reality check" on the client.<sup>129</sup> The attorney and mediator then essentially gang up on the client to "persuade" or "influence" the client to voluntarily accept the settlement. The practice is effective in settling cases because few laypersons can withstand the pressure from both their lawyer and the neutral mediator. Additionally, it is efficient and consistent with acceptable practices in the adversary system. Nonetheless, it may seriously infringe on the principle of self-determination. Traditional duress principles would provide a pressured party no relief if the "threats" come from the party's lawyer<sup>130</sup> and the mediator, not from

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<sup>126</sup> See PERILLO, *supra* note 116, § 28.2, at 41 (explaining that under traditional principles of duress, if the threatened person could have obtained prompt and adequate relief in court, no claim for duress could succeed).

<sup>127</sup> *Id.* at 42.

<sup>128</sup> RESTATEMENT (SECOND) OF CONTRACTS § 175(2) (1981).

<sup>129</sup> Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 429–30 (2002) (reporting that 57.7% of lawyers representing individual clients said that they chose mediation because it provided a "needed reality check for [their] client[s]").

<sup>130</sup> See *In re Marriage of Banks*, 887 S.W.2d 160, 163–64 (Tex. App. 1994) (concluding that threats of a party's attorney cannot be attributed to duress caused by the adverse party); see also *Olam v. Congress Mortgage Co.*, 68 F.Supp. 2d 1110, 1141 n.46 (N.D. Cal. 1999) (complaining of threats by lawyer); *McKinlay v. McKinlay*, 648 So. 2d 806, 808 (Fla. Dist. Ct. App. 1995) (complaining of unfair pressure from adverse counsel, the mediator, and her counsel); *Vela v. Hope Lumber & Supply Co.*, 966 P.2d 1196, 1198

the adverse party. Furthermore, if both the mediator and the lawyer believe the settlement is fair, it likely is within the range of settlements the courts would find acceptable as well.

Professor Welsh has argued that when dealing with mediator misconduct, the doctrine of undue influence might be the better legal theory to protect the fairness of the process.<sup>131</sup> Undue influence requires a relationship of domination by the mediator with regard to a party or some reasonable basis for a party to believe that the mediator "will not act in a manner inconsistent with [the party's] welfare."<sup>132</sup> Mediators make representations that they are neutral and can be trusted with confidential information, but they frequently inform the parties that as neutrals they do not assess or guarantee the fairness of any settlement.<sup>133</sup> Parties are usually told that it is totally up to them to voluntarily decide what they are willing to agree to in a settlement. On the surface, it may be patently unreasonable for a party to believe that the mediator is concerned at all about whether the settlement offer is fair. The reality is that some neutrals become concerned about the welfare of the parties and others do not.<sup>134</sup>

In some jurisdictions, undue influence might require proof that a person who has obtained a confidence has taken unfair advantage of that confidence.<sup>135</sup> According to Joseph M. Perillo, "[t]he foremost indicator of undue influence is an unnatural transaction resulting in the enrichment of one of the parties at the expense of the other."<sup>136</sup> A party would have a difficult time proving that a mediator is receiving an unfair advantage by getting the parties to settle.<sup>137</sup> Also,

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(Okla. Civ. App. 1998) (complaining of attorney, mediator, and third party threats); *Golden v. Hood*, No. E1999-02443-COA-MR3-CV, 2000 WL 122195, at \*2 (Tenn. Ct. App. Jan. 26, 1996) (complaining of attorney's threats).

<sup>131</sup> Welsh, *supra* note 10, at 84.

<sup>132</sup> RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (1981).

<sup>133</sup> In Minnesota, mediators may be required to inform parties that, "the mediator has no duty to protect [the parties'] interests or provide them with information about their legal rights." MINN. STAT. § 572.35(1) (2002).

<sup>134</sup> See, e.g., Robert Dingwall & Gale Miller, *Lessons from Brief Therapy? Some Interactional Suggestions for Family Mediators*, 19 CONFLICT RESOL. Q. 269, 270 (2002) (suggesting that divorce mediators have difficulty maintaining neutrality in the face of participant distress).

<sup>135</sup> See CAL. CIV. CODE § 1575 (West 2003).

<sup>136</sup> PERILLO, *supra* note 116, § 28.10, at 63.

<sup>137</sup> See generally *Berg v. Bregman*, No. B149130, 2002 WL 31256677, at \*8 (Cal. Ct. App. Oct. 8, 2002) (refusing to set aside a mediated settlement agreement because of undue influence by the party's attorney, in part because there was no evidence of any unfair advantage the attorney received).

if the persuasion comes from a third-party, like a mediator, the agreement cannot be avoided if the adverse party gave value without notice of misconduct.<sup>138</sup>

### E. *Fraud/Misrepresentation*

Fraud and misrepresentation are traditional defenses to a contract enforcement action and have been raised in cases where the agreement was reached during mediation. Initially, the party asserting the defense must establish that the adverse party made a misrepresentation of fact on a material issue.<sup>139</sup> As a general rule, statements of opinion or predictions do not qualify as representations of fact.<sup>140</sup> Statements of opinions and predictions are hard to categorize as true or false, and rarely is a person reasonable in relying on these types of statements.

Parties asserting the defense must also establish that they acted reasonably when they relied upon the misrepresentations.<sup>141</sup> If the party can readily verify the accuracy of a misrepresented fact, the party usually is not reasonable in relying on the representation. As with other contractual defenses raised in connection with a mediation agreement, this defense is complicated by overlapping rules relating to confidentiality. Some mediation privilege statutes and rules make an express exception for evidence of fraud or misrepresentation,<sup>142</sup> and some do not.<sup>143</sup> Even in a jurisdiction where privilege rules would allow evidence on these issues, the elements of fraud are difficult to establish in court-connected mediations.

Courts, and a large portion of the mediation community, believe that notwithstanding the emphasis on candor in mediation, parties should not reasonably expect the adverse party, or for that matter the mediator,<sup>144</sup> to

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<sup>138</sup> See PERILLO, *supra* note 116, § 28.10.

<sup>139</sup> See generally FARNSWORTH, *supra* note 53, § 4.10, at 244 (describing the common law contractual defense of fraud).

<sup>140</sup> *Id.* § 4.11.

<sup>141</sup> *Id.* § 4.14, at 255–56.

<sup>142</sup> See generally UNIF. MEDIATION ACT § 6(b)(7) (2003) (providing an exception to the parties' privilege for traditional contract defenses).

<sup>143</sup> See *Brown v. Brown*, No. 03-01-00520-CV, 2002 WL 1343222, at \*4 n.5 (Tex. App. June 21, 2002) (rejecting evidence of what transpired during the mediation); *Vick v. Waits*, No. 05-00-01122-CV, 2002 WL 1163842, at \*3 (Tex. App. June 4, 2002) (acknowledging that parties can maintain an action for fraudulent inducement of a mediated settlement agreement but precluding evidence of the alleged misrepresentation made during mediation because of privilege rules).

<sup>144</sup> Some mediators, particularly lawyers, may have professional obligations not to intentionally misrepresent facts, at least when representing clients. See MODEL RULES OF PROF'L CONDUCT R. 4.1 (1999). Some jurisdictions have ethical codes for mediators that

represent facts truthfully or accurately. For example, in *Chitkara v. New York Telephone Co.*,<sup>145</sup> the plaintiff in a discrimination claim tried to have an agreement set aside based in part on misrepresentations by the mediator. According to the plaintiff, the mediator harangued him into settling by exhorting, "Mr. Chitkara, Come on! What are we doing here? You have no case! This case belongs to the trustees of the bankruptcy court" and stating that the only way plaintiff would ever "see a dime" was if he "agreed to the mediated settlement then and there."<sup>146</sup>

After agreeing to the settlement, plaintiff was advised by bankruptcy lawyers that the mediator's statement was false.<sup>147</sup> Plaintiff's claim would not have been affected by the bankruptcy. The court of appeals agreed with the trial court that plaintiff could not show justifiable reliance and could not succeed on a misrepresentation claim.<sup>148</sup> According to the court:

The nature of mediation is such that a mediator's statement regarding the predicted litigation value of a claim, where that prediction is based on a fact that can readily be verified, cannot be relied on by a counseled litigant whose counsel is present at the time the statement is made.<sup>149</sup>

The prefatory note to the Uniform Mediation Act<sup>150</sup> further advances the view that although candor is encouraged, truth telling is not necessarily expected in mediations. Parties must be ever vigilant and verify all important statements.<sup>151</sup> In theory, most assertions in court-connected mediations could be

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might impose this obligation. See MINN. GEN. R. PRAC. 114 app. Code of Ethics, R. 5. ("A neutral shall not knowingly make false statements of fact or law").

<sup>145</sup> *Chitkara v. New York Tel. Co.*, No. 01-7274, 2002 WL 31004729, at \*\*2 (2d Cir. Sept. 6, 2002), *cert denied*, 123 S. Ct. 2091 (2003); *see also* *Brinkerhoff v. Campbell*, 994 P.2d 911, 915-16 (Wash. Ct. App. 2000) (refusing to attribute the mediator's mistaken representation of policy limits to the adverse party).

<sup>146</sup> *Chitkara*, 2002 WL 31004729, at \*\*1.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at \*\*2 (relying on RESTATEMENT (SECOND) OF CONTRACTS § 164(2)).

<sup>149</sup> *Id.*; *see also In re Patterson*, 969 P.2d 1106, 1110-11 (Wash. Ct. App. 1999) (rejecting claim of fraud in part because the party had no right to rely on a representation of value when the party could have had an appraisal).

<sup>150</sup> UNIF. MEDIATION ACT prefatory note 1 (2003):

Although it is important to note that mediation is not essentially a truth-seeking process in our justice system such as discovery, if the parties realize that they will be unable to show that another party lied during mediation, they can ask for corroboration of the statement made in mediation prior to relying on the accuracy of it.

<sup>151</sup> Under the Uniform Mediation Act, parties could testify about mediation communications relevant to contractual defenses if the court determined the necessity for the

verified in the pre-trial discovery process. Consequently, notwithstanding the mediator's efforts to encourage candor, it may be unreasonable for a party to believe that "candid" statements made by the adverse party, or for that matter the mediator, are truthful.<sup>152</sup>

## F. Mistake

Many unhappy parties to mediation have unsuccessfully attempted to defend against the enforcement of a settlement agreement by claiming mistake. Rarely have appellate courts refused to enforce an otherwise valid settlement agreement based on the defense of mistake.<sup>153</sup> Raising the defense, however, along with claims of fraud and duress, may expand the scope of available evidence and encourage the courts to disregard claims of confidentiality or mediator's privilege.<sup>154</sup>

To void an agreement based on mistake, the proponent usually must establish a mutual mistake<sup>155</sup> as to an existing, material fact that serves as a "basic

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evidence substantially outweighs the interest of confidentiality. UNIF. MEDIATION ACT § 6(b)(2) (2003). The mediator retains a privilege, however. *See id.* § 6(c). Thus, a party could claim that a mediator made a false representation in a private caucus on behalf of the adverse party and the mediator's testimony might be unavailable. *Id.*

<sup>152</sup> Some have argued that there should be a duty of good faith imposed on parties to mediations. *See generally* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 620 (1997) (concluding that by legislation, court rule, or ethical code, mediation parties and lawyers should be required to abide by some type of good faith or meaningful participation standard); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 961–64 (2001) [hereinafter Kovach, *New Wineskins*] (arguing for an ethical rule imposing an obligation of good faith).

<sup>153</sup> *But see* DR Lakes Inc. v. Brandsmart U.S.A., 819 So. 2d 971, 974–75 (Fla. Dist. Ct. App. 2002) (remanding for factual determination of whether a clerical error in the settlement document of \$600,000 was a mutual mistake); Boardman v. Boardman, No. C7-02-974, 2002 WL 31867759, at \*2 (Minn. Ct. App. Dec. 24, 2002) (affirming the lower court's decision to amend a mediated settlement agreement based on mistake).

<sup>154</sup> *See* Cain v. Saunders, 813 So. 2d 891, 894 (Ala. Civ. App. 2001) (finding privilege rules inapplicable on the issue of whether fraud or mistake affected the settlement); Feldman v. Kritch, 824 So. 2d 274, 276–77 (Fla. Dist. Ct. App. 2002) (allowing evidence, including mediator testimony about mediation communications on the issue of mutual mistake); *DR Lakes*, 819 So. 2d at 974 (ruling that the mediation privilege statute was not applicable in a case involving the defense of mistake). *But see* Eisendrath v. Super. Ct., 134 Cal. Rptr. 2d 716, 720 (Cal. Ct. App. 2003) (applying privilege rules that precluded testimony about mistake).

<sup>155</sup> A mutual mistake is one that is "common to both parties." *Magowan v. Magowan*, 812 A.2d 30, 35 (Conn. App. Ct. 2002) (citation omitted); *Breiter v. Breiter*, No.

assumption" of the agreement.<sup>156</sup> Further, the proponent cannot void the contract if the proponent has assumed the risk of the mistake, such as in cases where the product sold is labeled "as is."<sup>157</sup>

*Sheng v. Starkey Laboratories, Inc.*<sup>158</sup> demonstrates the difficult burden a party has to bear to successfully void a settlement agreement based on mistake. While defendant's motion for summary judgment was pending, the parties were ordered to mediation.<sup>159</sup> The court decided to grant defendant's motion and signed it, but did not enter the order, and mailed copies to counsel on a Friday. Before receiving the court's order, the parties settled at a mediation.<sup>160</sup> The judge subsequently withdrew the summary judgment order and refused to void the settlement agreement in response to defendant's claim of mistake.<sup>161</sup> First, the court ruled that the mistake was simply an error about the value<sup>162</sup> of the claim and did not go to the very nature of the agreement.<sup>163</sup> According to the court, even after successful summary judgment motions, claims have some settlement value. Second, the defendant assumed this risk by choosing to settle, knowing full well the summary judgment motion was pending.<sup>164</sup>

Obtaining relief based on mutual mistake is difficult, but successfully claiming unilateral mistake is nearly impossible. While it may be possible to void a contract based on unilateral mistake of a basic assumption, the proponent must establish that enforcing the contract would be unconscionable or that the adverse party had reason to know or somehow caused the mistake.<sup>165</sup> Further, the proponent must prove that he has not agreed to accept the risk or the risk should

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FA990720705S, 2003 WL 549062, at \*6 (Conn. Super. Ct. Jan. 23, 2003) (citation omitted).

<sup>156</sup> RESTATEMENT (SECOND) OF CONTRACTS § 152 (1981); *see also* *Sheng v. Starkey Labs., Inc.*, 117 F.3d 1081, 1084 (8th Cir. 1997) (concluding that any mistake justifying rescission "must go to the very nature of the deal").

<sup>157</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 154 (1981); *see also* FARNSWORTH, *supra* note 53, § 9.3, at 628.

<sup>158</sup> *Sheng*, 117 F.3d at 1084.

<sup>159</sup> *Id.* at 1082.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1084.

<sup>163</sup> *Id.*; *see also* *Taylor's Nursery, Inc. v. Baylor Boys, Inc.*, No. CO02-134, 2003 WL 223334, at \*\*\*3 (N.C. Ct. App. Feb. 4, 2003) (stating that mutual mistakes must comprise the essence of the agreement to be successful).

<sup>164</sup> *Sheng*, 117 F.3d at 1084.

<sup>165</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981).

not reasonably be allocated to him.<sup>166</sup> Thus, relief from an agreement based on unilateral mistake is rare.<sup>167</sup>

#### IV. LEGISLATIVE RESPONSE

##### *A. Settlements in Mediations Require Different Rules*

Many state legislatures have recognized that settlement agreements obtained in mediations raise different concerns than bilateral negotiated settlements. Some state statutes provide explicit requirements for the enforceability of mediated settlements without relying on common law principles of contract law.<sup>168</sup> In some types of mediations, a statute may preclude any court enforcement of a mediated settlement absent affirmative steps by the parties indicating a desire to make the agreement enforceable.<sup>169</sup> In the context of these disputes, a judgment is made that if the settlement agreement breaks down, the parties should again mediate the dispute rather than look to the courts to enforce rights. In the context of court-connected mediation, the interest in finality would likely militate against this approach. As an alternative approach to protect against overreaching in the mediation process, some states have passed consumer-type cooling off statutes, allowing parties a period of time to rescind any mediation agreement.<sup>170</sup>

Legislation frequently limits the enforceability of mediated settlement agreements by restricting access to proof through privilege rules.<sup>171</sup> For example, the Uniform Mediation Act makes oral mediation settlement agreements unenforceable indirectly by creating a complicated set of privileges and rules of

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<sup>166</sup> See *id.* §§ 153, 154.

<sup>167</sup> See FARNSWORTH, *supra* note 53, § 9.4, at 631; see also *Ghahramani v. Guzman*, 768 So. 2d 535, 537 (Fla. Dist. Ct. App. 2000) (stating that unilateral mistake cannot be a defense to the enforcement of a mediated settlement agreement).

<sup>168</sup> See COLE ET AL., *supra* note 34, § 4:13 (discussing various statutes that alter the common law approach for enforcing mediated settlement agreements).

<sup>169</sup> See CAL. BUS. & PROF. CODE § 467.4(a) (Deering 2003) (providing that an agreement “shall not be enforceable in a court nor shall it be admissible as evidence in any judicial or administrative proceeding,” unless the contract “includes a provision that clearly states the intention of the parties that the agreement . . . shall be so enforceable or admissible as evidence”); MINN. STAT. § 518.619(7) (2002) (providing that mediation settlements in child custody disputes are not enforceable unless the parties and their counsel consent to present it to the court and the court adopts it).

<sup>170</sup> See, e.g., CAL. INS. CODE § 10089.82(c) (West 2003) (providing a three day right of rescission for the insured parties in earthquake insurance mediations); FLA. CT. FAM. L. R. 12.740(f) (2003) (providing a 10 day right of rescission for parties in family mediation).

<sup>171</sup> See, e.g., ARK. CODE ANN. § 16-7-206 (Michie 1987); KAN. STAT. ANN. § 60-452(a) (1994); MINN. STAT. § 595.02 (1) (2002); N.J. STAT. ANN. § 2A:23A-9(c)–(e) (West 2000).

confidentiality that preclude disclosure or testimony about oral agreements.<sup>172</sup> Many states directly require some type of executed writing before a mediated settlement agreement can be enforced in court,<sup>173</sup> reinventing a statute of frauds for mediation.

Some legislation moves beyond mandating a signed writing, requiring that the agreements include specified clauses or "magic words."<sup>174</sup> Through court rules, several states require that an agreement reached in court-connected mediation "shall be reduced to writing and signed by the parties and their counsel, if any".<sup>175</sup> To be enforceable in Minnesota, a mediated settlement agreement, if in writing,<sup>176</sup> must include certain boilerplate warnings, including language that this written settlement agreement is binding.<sup>177</sup>

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<sup>172</sup> See UNIF. MEDIATION ACT § 6(a)(1) (2003); see also *infra*, note 241.

<sup>173</sup> See, e.g., COLO. REV. STAT. ANN. § 13-22-302(2.5) (West 2002); CONN. GEN. STAT. ANN. § 52-235(d)(b) (West 2003); IND. ALTERNATIVE DISP. RESOL. R. 2.7(E)(2); OHIO REV. CODE ANN. § 2317.023(c)(1)–(4) (West 2003).

<sup>174</sup> See, e.g., CAL. EVID. CODE § 1123 (Deering 2002) (providing that a written mediated settlement agreement can be admissible if the "agreement provides it is admissible," "enforceable," or contains "words to that effect"); TEX. FAM. CODE ANN. § 6.602(b)(1)–(3) (Vernon 1998 & Supp. 2003) (providing that a mediated settlement agreement is enforceable if it contains a "prominently displayed statement that is in boldface type or capital letters or underlined that the agreement is not subject to revocation; is signed by each party to the agreement; and is signed by the party's attorney, if any, who is present at the time the agreement is signed.").

<sup>175</sup> FLA. R. CIV. P. 1.730(b) (2003); see also IND. ALTERNATIVE DISP. RESOL. R. 2.7(E)(2) (2003); MEDIATED SETTLEMENT. CONF. R. 4(C) (2002).

<sup>176</sup> Compare *Vo v. Honeywell, Inc.*, No. C3-97-1393, 1998 WL 15909, at \*2 (Minn. Ct. App. Jan. 20, 1998) (enforcing an oral settlement agreement reached during mediation), with *Schwartz v. Adamson*, No. C8-98-1416, 1999 WL 170676, at \*2 (Minn. Ct. App. March 30, 1999) (refusing to enforce an oral settlement agreement where a written agreement memorializing the settlement was not signed).

<sup>177</sup> MINN. STAT. § 572.35, (1) (2002). The requirement can be satisfied if somebody (probably the mediator) advises the parties of these rights. See *Haghighi v. Russian-Am. Broad. Co.*, 173 F.3d 1086, 1089 (8th Cir. 1999) [hereinafter *Haghighi III*]; *Haghighi v. Russian-Am. Broad. Co.*, 945 F. Supp. 1233, 1234-35 (D. Minn. 1996), *rev'd*, 173 F.3d 1086 (8th Cir. 1999) [hereinafter *Haghighi I*]; *Haghighi v. Russian-Am. Broad. Co.*, 577 N.W.2d 927 (Minn. 1998) (answering certified question from *Haghighi v. Russian-Am. Broad. Co.*, 945 F. Supp. 1233 (D. Minn. 1996), *rev'd*, 173 F.3d 1086 (8th Cir. 1999)) [hereinafter *Haghighi II*]; see also James R. Coben & Peter N. Thompson, *The Haghighi Trilogy and the Minnesota Civil Mediation Act: Exposing a Phantom Menace Casting a Pall Over the Development of ADR in Minnesota*, 20 HAMLINE J. PUB. L. & POL'Y 299, 324 (1999) (arguing that the insistence on technical terms in mediated settlement agreements contrary to community expectations creates uncertainty in whether mediation settlements are enforceable "casting a pall over the development of ADR in Minnesota").



### B. *Return to Formality—Return to the “Seal”*

The focus on technical formality as a requirement for enforceability in court is reminiscent of the early common law requirement that agreements were enforceable only if under seal. The seal and other contract formalities traditionally served channeling and cautionary functions,<sup>178</sup> limiting judicial discretion. In theory, when issues were brought before a court, the bright-line rules made it easy for courts to determine when to intervene in these private disputes. Thus, the rules were designed to encourage bargaining parties to act with care and also to reduce litigation and conflict. Of course, the focus on technical formality led the courts away from any concern about fair treatment or protection of the parties' legitimate expectations or reliance interests.

In part to avoid the unjust consequences that would result from not enforcing fair agreements that lacked the proper formality, the standards became more relaxed over time. For example, courts would accept substitutes for the formal wax seal.<sup>179</sup> Eventually, the personal signature took the place of the formal seal.<sup>180</sup> Courts and legislators opted for judicial flexibility in deciding whether contracts were intended to be enforceable and whether they should be enforced, rather than preserving a ritual that was no longer effective in a literate, commercially-developed society.<sup>181</sup>

The return to technical formality, although perhaps consistent with an emerging trend,<sup>182</sup> appears totally inconsistent with mediation's stated goals of flexibility and self-determination. On the other hand, limiting access to the courts by resorting to technical bright-line rules may well reflect the ADR community's continued distrust and disdain for the litigation process that fueled the contemporary ADR movement.<sup>183</sup> The attempt to manage access to the courts

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<sup>178</sup> See FARNSWORTH, *supra* note 53, § 2.16, at 86–87; Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–03 (1941).

<sup>179</sup> 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 2:4, at 66 (4th ed. 1990) [hereinafter WILLISTON].

<sup>180</sup> FARNSWORTH, *supra* note 53, § 2.16, at 86.

<sup>181</sup> See *id.*; ERIC MILLS HULMES, CORBIN ON CONTRACTS § 10.18, 417–18 (rev. ed. 1996); WILLISTON, *supra* note 179, § 2.4, at 66–68.

<sup>182</sup> Legislatures throughout the country have enacted statutes limiting access to courts if certain formalities are not met. See Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 258 (1995) (addressing the increased recognition of the value of form in contract enforcement); see also *Phillippe v. Shappell Industries, Inc.*, 743 P.2d 1279, 1289–90 (Cal. 1987) (noting legislative trends in consumer contracts reinventing the statute of frauds), *cert. denied*, 486 U.S. 1011 (1988).

<sup>183</sup> See Menkel-Meadow, *supra* note 5, at 417 (“At its best, ADR was intended to provide more creative, particularized, flexible and participative solutions to problems than the more traditional and adversary legal system could offer.”). Courts on the other hand,

through technical rules may reflect a concern that modern contract principles premised on an arms-length bargaining relationship do not adequately protect the interests of the participants in the mediation process. The renewed focus on formality may be fueled in part by an interest in clarifying or limiting litigable issues to ensure predictability and consistency. However, the history of the statute of frauds should inform us that where technical, formal rules, even those designed to reduce litigation, run contrary to expectations and practices in the community, increased conflict and increased litigation will likely result.<sup>184</sup>

As a general proposition, Americans expect people to do what they promise, even if their words and promises are not printed on a typed document that has been signed and sealed.<sup>185</sup> Oral agreements are generally enforceable with some recognized and frequently-litigated exceptions.<sup>186</sup> Thus, a return to formality can frustrate the reasonable expectations of parties and can add to, rather than reduce, conflict.

### *C. Requiring a Writing for Mediated Settlement*

The issues created by attempts to enforce oral mediation agreements appear at first blush to be quite similar to the issues raised when parties enter an oral agreement in a non-mediation setting. The court must focus on the testimony and conduct of the parties to determine whether an agreement was reached, and if so, its terms. If the parties present conflicting testimony, there is a difficult proof problem. This proof problem is not unique to oral agreements in mediations. In fact, factual disputes in a mediation process might be more easily resolved because of the presence of the neutral party, who can provide a "neutral"

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embrace formal, technical rules because they reduce case loads.

<sup>184</sup> In California, savvy parties can avoid the harsh consequences of technical rules by formalistic ritual. If the parties officially terminate the mediation before dictating the terms of the agreement, then the subsequent agreement is not bound by the technical rules limiting its enforceability. *See Regents of the Univ. of Cal. v. Sumner*, 50 Cal. Rptr. 2d 200, 202-03 (Cal. Ct. App. 1996) (admitting a transcript of a dictated oral settlement because it was dictated after the parties terminated the mediation).

<sup>185</sup> *But see Deason, supra* note 10, at 53 ("The impetus for these mediation writing requirements seems to spring in some states from a concern for protecting unrepresented parties who may not realize the seriousness of an agreement they reach in mediation.").

<sup>186</sup> Many courts continue to enforce oral mediation agreements. *See, e.g., Sheng v. Starkey Labs., Inc.*, 117 F.3d 1081, 1083 (8th Cir. 1997) (applying Minnesota Law); *Orta v. Con-Way Transp.*, No. CIV.A.02-1673, 2002 WL 31262063, at \*2 (E.D. Pa. Oct. 8, 2002); *Lampe v. O'Toole*, 685 N.E.2d 423, 424 (Ill. App. Ct. 1997); *Vo v. Honeywell*, No.C3-97-1393, 1998 WL 15909, at \*2 (Minn. Ct. App. Jan. 20, 1998); *Kaiser Found. Health Plan v. Doe*, 903 P.2d 375, 383 (Or. Ct. App. 1995); *John Deere Co. v. A & H Equip., Inc.* 876 P.2d 880, 889 (Utah Ct. App. 1994), *cert. denied*, 890 P.2d 1034 (Utah 1994).

perspective on what was said.<sup>187</sup> In the typical caucus-based mediation, communications between the parties are conveyed by the mediator. The mediator chooses the language. Mediator testimony may be essential to any accurate assessment of what was said in these private sessions. But of course, opening up the private mediation caucus to public scrutiny at trial implicates privacy and confidentiality concerns. Most mediators chafe at the prospect of having to take the witness stand and recite publicly what was extracted through trust and confidence at the mediation session.

Enforcing oral settlement agreements in court-connected mediations raises unique issues. In many bargaining settings, past dealings, trade usage, and past performance tend to shed light on any contractual relationship created by oral exchanges. When disputes arise about whether a matter was settled in a court-connected mediation, the alleged agreements tend to be wholly executory with little past experience between parties to provide guidance in interpretation. Certainly, encouraging parties to memorialize their agreement in a writing ought to be encouraged, but this will not resolve all conflict.

A formal, written contract may assist the court in deciding whether an agreement was reached and provides an objective basis for applying the terms of the agreement. However, refusing to enforce fair agreements not memorialized in a compliant writing does not necessarily effectuate the desires of the parties and may conflict with mediation's core value of self-determination. Many have noted that the writing requirement of the statute of frauds promotes more fraud than it prevents.<sup>188</sup> The statute of frauds did not eliminate litigation relating to oral agreements. In fact, it spawned hundreds of cases focusing not on the substantive issue of whether the parties reached an agreement that should be enforced but on numerous issues about the application of this technical statute.

Imposing technical rules that run contrary to community values or expectations tends to increase litigation and produce technical decisions by the courts that create even more litigation and confusion. The experiences in Florida, Indiana, and Texas are instructive. Pursuant to court rules in these states,

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<sup>187</sup> See *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1136 (N.D. Cal. 1999), :

[T]he mediator is positioned in this case to offer what could be crucial, certainly very probative, evidence about the central factual issues in this matter. There is a strong possibility that his testimony will greatly improve the court's ability to determine reliably what the pertinent historical facts actually were. Establishing reliably what the facts were is critical to doing justice . . .

*Id.*; see also *Ramirez v. DeCoster*, 142 F. Supp. 2d 104, 113 (D. Me. 2001) (crediting the mediator as "the most neutral and dispassionate observer of what was said and done").

<sup>188</sup> See, e.g., *Marvin v. Wallis*, 119 Eng. Rep. 1035, 1038 (K.B. 1856); see also FARNSWORTH, *supra* note 53, § 6.1, at 366. But see Karl N. Llewellyn, *What Price Contract—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931) (supporting the statute of frauds).

otherwise fair mediation settlement agreements are not enforceable unless they are in writing and signed by the parties and their lawyers.<sup>189</sup> These rules, designed to clarify and reduce conflict, are instead implicated in substantial litigation. In *Gordon v. Royal Caribbean Cruises, Ltd.*,<sup>190</sup> the Florida District Court of Appeals refused to enforce a written settlement agreement obtained during a mediation that was signed by the attorney in the presence of the party but was not signed by the party itself.<sup>191</sup> But, in *Jordan v. Adventist Health System/Sunbelt, Inc.*,<sup>192</sup> a different Florida appellate court enforced a settlement agreement reached during mediation that was signed by the parties but not by their attorneys.<sup>193</sup> The court in *Jordan* warned that “the mediation rules are developing sufficient complexity and have experienced such frequent amendment that even those most familiar with them seem to have difficulty following their requirements.”<sup>194</sup>

The Indiana courts also have repeatedly been called upon to interpret a similar rule. In *Silkey v. Investors Diversified Service, Inc.*, a mediator memorialized an agreement on a tape recording with each party assenting to the agreement on the tape.<sup>195</sup> The settlement was challenged because there was no executed writing as required by the Indiana court rule.<sup>196</sup> The court of appeals enforced the agreement, concluding that the court rule did not supersede the common law rule that made oral settlement agreements enforceable.<sup>197</sup> Three years later, the Indiana Supreme Court disapproved of that interpretation in

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<sup>189</sup> See FLA. R. CIV. P. 1.730(b); IND. ALTERNATIVE DISP. RESOL. R. 2.7(E)(2); TEX. R. CIV. P. 11.

<sup>190</sup> *Gordon v. Royal Caribbean Cruises, Ltd.*, 641 So. 2d 515, 517 (Fla. Dist. Ct. App. 1994).

<sup>191</sup> *Gordon*, 641 So. 2d at 517; see also *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517, 518–19 (Fla. Dist. Ct. App. 1992) (refusing to enforce an oral agreement allegedly entered into during mediation); *Hudson v. Hudson*, 600 So. 2d 7, 8–9 (Fla. Dist. Ct. App. 1992) (refusing to enforce a settlement agreement signed by mediator).

<sup>192</sup> *Jordan v. Adventist Health Sys./Sunbelt Inc.*, 656 So. 2d 200, 203 (Fla. Dist. Ct. App. 1995).

<sup>193</sup> *Id.* at 202.

<sup>194</sup> *Id.* at 201 n.1. This technical privilege rules created additional litigation. See *Enterprise Leasing Co. v. Jones*, 789 So. 2d 964, 966 (Fla. 2001) (refusing to automatically disqualify a trial judge who was improperly informed of confidential mediation information).

<sup>195</sup> *Silkey v. Investors Diversified Servs., Inc.*, 690 N.E.2d 329, 331 (Ind. Ct. App. 1997).

<sup>196</sup> *Id.* at 332 (citing IND. ALTERNATIVE DISP. RESOL. R. 2.7(E)(2), which provides that if an “agreement is reached . . . it shall be reduced to writing and signed by the parties and their counsel”).

<sup>197</sup> *Silkey*, 690 N.E.2d at 332.

*Vernon v. Acton*.<sup>198</sup> The court refused to allow testimony about an oral settlement agreement arrived at during mediation because the court rules precluded oral settlement in court-connected mediations.<sup>199</sup>

The Indiana Supreme Court expressed its hope that “[r]equiring written agreements, signed by the parties, is more likely to maintain mediation as a viable avenue for clear and enduring dispute resolution rather than one leading to further uncertainty and conflict.”<sup>200</sup> However, technical rules tend to breed uncertainty and more litigation. In *Reno v. Haler*, the Indiana Court of Appeals had to revisit this rule to enforce a settlement agreement that was typed but unsigned.<sup>201</sup> The court concluded that the parties complied with the court rule when they signed the mediator’s handwritten notes that conformed to the unsigned settlement agreement.<sup>202</sup> Again, in *Spencer v. Spencer*, the Indiana Court of Appeals had to address the issue of whether to enforce an oral mediated settlement agreement.<sup>203</sup> Thus, the technical rules do not eliminate litigation but shift the focus of it away from the merits and the issues of self-determination or fairness and on to technical, legalistic issues.

A similar and long-standing rule in Texas has also bred confusion and repeated litigation over technical issues. Like the rules in Florida and Indiana, the Texas rule requires that to be enforceable, settlements in pending suits must be written, signed, and filed, unless made in open court and entered on the record.<sup>204</sup> *Cantu v. Moore* is a recent case in the long line of decisions addressing

<sup>198</sup> *Vernon v. Acton*, 732 N.E.2d 805, 809–10 (Ind. 2000).

<sup>199</sup> *Id.* at 810.

<sup>200</sup> *Id.*

<sup>201</sup> *Reno v. Haler*, 734 N.E.2d 1095, 1099 (Ind. Ct. App. 2000); *see also In re Paternity of K.R.H.*, 784 N.E.2d 985, 989 (Ind. Ct. App. 2003) (finding mediation rules not applicable to negotiations referred to by the judge as “informal mediation” without the mediator); *Estate of Skalka v. Skalka*, 751 N.E.2d 769, 772 (Ind. Ct. App. 2001) (finding that because the trial judge was not acting as a mediator, the special mediation rules were not applicable).

<sup>202</sup> *Reno*, 734 N.E.2d at 1098–99.

<sup>203</sup> *Spencer v. Spencer*, 752 N.E.2d 661, 663–65 (Ind. Ct. App. 2001) (refusing to enforce a mediated settlement agreement dictated by the mediator in the presence of the parties).

<sup>204</sup> TEX. R. CIV. P. 11. Other states have had similar experiences. *See Gelfand v. Gabriel*, No. B152557, 2002 WL 1397037, at \*1 (Cal. Ct. App. June 27, 2002) (enforcing a mediation settlement agreement in California not signed by plaintiff as required by CAL. CIV. PROC. CODE § 664.6 (West 1987 & Supp. 2003)); *Murphy v. Padilla*, 49 Cal. Rptr. 2d 722, 727 (Cal. Ct. App. 1996) (refusing to enforce settlement reached by attorneys); *see also Lavigne v. Green*, 23 P.3d 515, 518 (Wash. Ct. App. 2001) (challenging a settlement not in writing or put on the record); *In re Patterson*, 969 P.2d 1106, 1110–11 (Wash. Ct. App. 1999) (litigating the issue in Washington of whether a mediated settlement agreement is enforceable absent the signature of a party’s attorney); *Bryant v. Palmer Coking Coal Co.*,

this issue.<sup>205</sup> The Texas Court of Appeals ruled that a mediated settlement agreement, in part dictated to a court reporter outside of court and in part agreed upon in open court, was enforceable despite non-compliance with the Texas rule. In 1984, the Texas Supreme Court in *Kennedy v. Hyde* acknowledged the extensive litigation addressing this rule and its predecessor that had been in effect in Texas since 1877.<sup>206</sup> The Texas Supreme Court stated its belief that the rule reflected sound policy and that oral agreements “‘are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies.’”<sup>207</sup> The court recognized the essential “thorny” conflict between the substantive law of contracts which enforced oral agreements and this procedural rule.<sup>208</sup> With a straight face, the court stated “[o]ur holding, that Rule 11 means precisely what it says, should not be interpreted as requiring ‘slavish adherence’ to the literal language of the rule in all cases.”<sup>209</sup> Enough said.

#### *D. Really Technical Rules—Magic Words*

Minnesota’s statute requires certain “magic words” before a written mediated settlement agreement will be enforced.<sup>210</sup> Specifically, the statute requires clauses reciting 1) that the agreement is binding, 2) that the parties were advised that the mediator had no duty to protect their interest, 3) that signing might adversely affect their rights, and 4) that the parties understood that they should consult an attorney if they were uncertain about their rights.<sup>211</sup> Rather than

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858 P.2d 1110, 1112 (Wash. Ct. App. 1992) (refusing to enforce an agreement not signed or stipulated to under the Washington rule).

<sup>205</sup> *Cantu v. Moore*, 90 S.W.3d 821, 825 (Tex. App. 2002); *see also* *West Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 255–56 (Tex. App. 2002) (enforcing a mediated settlement signed by attorney but not by a partner); *In re Allen*, No. 07-96-0195-CV, 1996 WL 686895, at \*1–2 (Tex. App. Nov. 27, 1996) (refusing to enforce signed settlement agreement that was not filed); *Kosowska v. Khan*, 929 S.W.2d 505, 508 (Tex. App. 1996) (enforcing a non-complying settlement agreement that was certified by a shorthand reporter). *But see* *Moseley v. EMCO Mach. Works Co.*, 890 S.W.2d 529, 530–31 (Tex. App. 1994) (agreement dictated to court reporter not enforceable where consent was withdrawn).

<sup>206</sup> *Kennedy v. Hyde*, 682 S.W.2d 525, 526–27 (Tex. 1984).

<sup>207</sup> *Id.* at 529 (quoting *Birdwell v. Cox*, 18 Tex. 535, 537 (Tex. 1857)).

<sup>208</sup> *Id.* at 529.

<sup>209</sup> *Id.*

<sup>210</sup> MINN. STAT. § 572.35 (1996); *see also* CAL. EVID. CODE § 1123 (Deering 2002); TEX. FAM. CODE ANN. § 6.602 (Vernon 1998 & Supp. 2003).

<sup>211</sup> MINN. STAT. § 572.35 (1996). The current version of this statute may also be satisfied if the parties were “otherwise advised” of the above-stated risks in a manner other than being expressly contained within the agreement itself. MINN. STAT. § 572.35 (2003).

producing certainty, the statute encouraged litigation on technical issues unrelated to self-determination or fair agreements.

For example, *Haghighi v. Russian-American Broadcasting Company*<sup>212</sup> generated three separate published opinions by three different courts. Ultimately, the mediated settlement agreement initialed by the attorneys and signed on each page by the parties was found to be unenforceable.<sup>213</sup> No claim was made that the agreement was unfairly extracted or was an unfair bargain. Although the document stated that it was a “Full and Final Mutual Release of All Claims,” the document did not include the “magic words” of the Minnesota statute.<sup>214</sup> The document did not say it was “binding.”<sup>215</sup> Although the federal trial judge<sup>216</sup> characterized this approach as a “trap for both the unwary and the wary” and inconsistent with common expectations and practices, the Minnesota Supreme Court replied that if the statute produced unintended results, it was a problem for the legislature.<sup>217</sup> Of course, it really was a problem for the citizens in Minnesota who were compelled to go to mediation.

#### V. COMMENTATORS—FLEXIBLE CONTRACT PRINCIPLES MIXED WITH BRIGHT-LINE RULES

Commentators struggle with the propriety of judicial enforcement of agreements reached through the consensual process of mediation, in part because of the seemingly conflicting values between mediation and the litigation process. Mediation is valued because it is consensual, private, and collaborative; the trial system is adversarial and public. Ultimately, the commentators tend to agree that contract law is the appropriate method of enforcement, with special consideration given to context, or in some cases, special bright-line rules applied to accommodate these differing values.

In 1986, Robert P. Burns anticipated these modern enforcement issues in an essay exploring the relationship between the processes of mediation and

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<sup>212</sup> *Haghighi III*, 173 F.3d 1086, 1089 (8th Cir. 1999); *Haghighi I*, 945 F. Supp. 1233, 1234-35 (D. Minn. 1996), *rev'd*, 173 F.3d 1086 (8th Cir. 1999); *Haghighi II*, 577 N.W.2d 927 (Minn. 1998) (answering certified question from *Haghighi v. Russian-Am. Broad. Co.*, 945 F. Supp. 1233 (D. Minn. 1996), *rev'd*, 173 F.3d 1086 (8th Cir. 1999)).

<sup>213</sup> For an analysis of these cases see Coben & Thompson, *supra* note 177, at 300-07.

<sup>214</sup> *Haghighi III*, 173 F.3d at 1088.

<sup>215</sup> *Haghighi II*, 577 N.W.2d at 929.

<sup>216</sup> *Haghighi I*, 945 F. Supp. at 1234.

<sup>217</sup> *Haghighi II*, 577 N.W.2d at 930. After the *Haghighi* cases, the Minnesota legislature amended the statute to allow compliance with proof that somebody (presumably the mediator) advised the parties about the statutory requirements. See MINN. STAT. § 572.35 (2003) (as amended by 1999 Minn. Sess. Law Serv. 190 (West)); see also *supra* note 210.

litigation.<sup>218</sup> He concluded that mediated settlement agreements should be enforced by courts using contract law principles. Burns recognized the concern that exposing the mediation process to the enforcement powers of the court could “distort the course of mediation,”<sup>219</sup> but argued that contract law was sufficiently flexible to protect the interests of the mediation process.<sup>220</sup> In any contractual analysis, the context of the mediation process will be important in assessing contractual enforceability. Traditional contract law, according to Burns, allows for consideration of context.<sup>221</sup> Questions of power, exploitation, or agreement can all be worked out under contract analysis, which is flexible and case specific.<sup>222</sup>

Recently, James J. Alfini and Catherine G. McCabe addressed the increased number of cases where parties sought judicial enforcement of mediation settlements.<sup>223</sup> They noted the potential conflict between traditional contractual principles favoring settlement and judicial economy and one of mediation’s core values: self-determination.<sup>224</sup> Alfini and McCabe were also concerned about unfair practices in mediations, remarking that “allegations of settlement coercion raise troubling issues relating to mediation’s core values of party self-determination, voluntariness, and mediator impartiality that may not be easily discerned or correctable through the judicial process.”<sup>225</sup> They agreed with Burns that courts should continue to address the issue of enforceability of mediated settlement agreements in the context of contract law, but within “a framework that recognizes mediation’s unique character and attributes.”<sup>226</sup>

Other commentators agree that in general, contract principles should be applied, but by focusing on differing aspects of mediation’s “unique character and attributes,” they have urged the use of bright-line rules to preclude judicial discretion, or even judicial inquiry, into certain issues. Ellen E. Deason, who placed a high value on confidentiality in the mediation process, conceded that the interests in privacy and confidentiality must give way to the enforcement of a written mediated settlement agreement.<sup>227</sup> She viewed the value of applying

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<sup>218</sup> Robert P. Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DISP. RESOL. 93, 93 (1986).

<sup>219</sup> *Id.* at 93.

<sup>220</sup> *Id.* at 105.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 110.

<sup>223</sup> Alfini & McCabe, *supra* note 10, at 172.

<sup>224</sup> *Id.* at 173–74.

<sup>225</sup> *Id.* at 205.

<sup>226</sup> *Id.* at 206.

<sup>227</sup> Deason, *supra* note 10, at 102.



principles of contract law to enforce valid mediated settlement agreements as “affirming the effectiveness of mediation as a settlement process and reenforcing parties’ incentives to mediate.”<sup>228</sup> However, if the agreement is not reduced to writing, Deason believed that any enforcement actions would intrude too deeply into the confidentiality of the mediation.<sup>229</sup> Deason would enforce a bright-line rule precluding any contractual enforcement of oral agreements during a mediation.<sup>230</sup>

Nancy A. Welsh also argued that the general framework of contract law should apply to mediated settlement agreements, but with substantial modifications to protect mediation’s core value of self-determination.<sup>231</sup> She viewed self-determination broadly as insuring active and direct party “participation, communication, and negotiation; the parties’ identification and selection of the interests and substantive norms . . . [and] control over the final outcome.”<sup>232</sup> Welsh noted that “‘self-determination’ is not part of the lexicon regarding the enforcement of negotiated settlement agreements.”<sup>233</sup> Because of the presumption favoring settlements and the limited inquiry into what the parties actually desired, traditional contract law does not provide adequate protection for settlements arrived at under a mediation process designed to protect party self-determination. Muscle-mediators using high pressure tactics may well extract objective manifestation of assent, but not self-determined agreement.

Welsh suggested a number of modifications to contract law to accommodate mediation’s context and goals. For example, she addressed the possibility of expanding contract law principles to make it easier for an aggrieved party to

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<sup>228</sup> *Id.* at 37.

<sup>229</sup> *Id.* at 102.

<sup>230</sup> *Id.* This, of course, is similar to the approach represented by the Uniform Mediation Act. Although the Uniform Mediation Act does not address the enforcement of oral agreements, it precludes evidence about oral agreements, making them difficult, if not impossible, to prove. *See* UNIF. MEDIATION ACT § 6 reporter’s note, at 2 (2003) (explaining why the act provides no privilege exception to allow evidence about an oral settlement agreement).

<sup>231</sup> Welsh, *supra* note 10, at 87. Professor Welsh cited numerous ethical codes proclaiming self-determination as a core value of mediation. *See* FLA. R. FOR CERT. AND APPOINTED MEDIATORS 10:310; VA. R. PROF’L CONDUCT 2.11 (2000); *id.* at 3 n.1 (citing MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I (Joint Comm. of Delegates from Am. Arbitration Ass’n, Am. Bar Ass’n & Soc’y of Prof’ls in Dispute Resolution (1994)); *see also* Levin, *supra* note 91, at 273–74 (discussing various mediation rules and concluding that “[n]early all of these mediator rules place considerable emphasis on self-determination in mediation”).

<sup>232</sup> Welsh, *supra* note 10, at 80.

<sup>233</sup> *Id.* at 87.

establish coercion.<sup>234</sup> Welsh also suggested that the defense of undue influence could be expanded to address mediator coercion, arguing that the parties frequently assume that a mediator is in a fiduciary type of relationship with both parties.<sup>235</sup> Professor Welsh recognized that for this defense to work, mediator codes would have to be amended to create specific duties regulating mediator conduct.<sup>236</sup> Professor Welsh shared Deason's concern that increased litigation would impair confidentiality.<sup>237</sup> Ultimately, to protect the interest of self-determination of the parties in mediations, Welsh suggested that parties should have a three-day cooling off period or right of rescission.<sup>238</sup> Parties could then reflect on whether the agreement was in their best interests, free from the coercive pressures in the mediation.<sup>239</sup>

## VI. IMPOSING RIGID BRIGHT-LINE RULES TO A PROCESS PREMISED ON SELF-DETERMINATION

It is odd for ADR scholars to advocate bright-line, legalistic rules to remedy problems created in a process heralded because of its focus on self-determination. These rules lump people or cases into categories; they do not allow for individual differences or assessments based on the unique facts or personal choices made in each case. The litigation world favors bright-line rules because they limit judicial discretion and, in theory, reduce litigation. Whether the bright-line rules for ADR will result in more justice than injustice may in part depend on why and where the lines are drawn. Frequently, the lines are drawn arbitrarily as a matter of administrative or judicial convenience. Rarely will the lines be drawn to facilitate self-determination.

Technical rules might be justified in part on a general deterrence theory. Courts enforce a rule rigidly not because it results in justice in any one case, but

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<sup>234</sup> *Id.* at 82–84. However, Welsh warned that if mediator coercion is easily litigated, few people would want to be mediators. *Id.* at 83.

<sup>235</sup> *Id.* at 84–86; see *supra* note 31 and accompanying text

<sup>236</sup> Welsh, *supra* note 10, at 85.

<sup>237</sup> *Id.* at 86.

<sup>238</sup> *Id.* at 87–92.

<sup>239</sup> *Id.* at 88; see also Weller, *supra* note 10, at 14. Weller suggested that contract principles may be inadequate when enforcing mediated settlements. *Id.* According to Weller, the arms-length bargaining model that serves as the prototype for substantive contract principles is far from the reality of mediated settlements. *Id.* at 14–16. Because of the mediator's real power to influence the agreement in light of the parties' vulnerability, Weller argued that courts should rescind agreements if there is a disparity in expertise between the parties, and the disadvantaged party establishes a misunderstanding of the rights or ramifications of the agreement. *Id.* at 39.

because the harsh results produced encourage others to engage in better practices in the future. For example, one of the justifications for refusing to enforce an otherwise fair mediated oral settlement agreement is to encourage future mediation participants to engage in sound practices and reduce their agreements to writing.<sup>240</sup>

Certainly, parties should reduce agreements to writing to identify and resolve any lingering areas of disagreement and to memorialize the moment. Smart lawyers who frequently represent parties in mediations, perhaps even trained mediators, might eventually bring their behavior into compliance and execute enforceable writings.<sup>241</sup> But where the rules governing mediation settlements are different from the rules governing other negotiated settlements, it is unlikely that the general public will understand the distinctions. Unrepresented parties, as well as parties represented by lawyers unfamiliar with technical mediation rules, would be at risk of such misunderstanding in mediations, unless of course, a trained mediator helps them out and provides legal advice.<sup>242</sup> Some mediators might help out and some might not.<sup>243</sup>

Imposing technical, specialized rules in mediations such as a statute of frauds, that conflict with custom, practice, or reasonable expectations, will create confusion, uncertainty, and litigation. Dissatisfied parties will litigate such issues as what types of negotiations qualify as mediation sessions governed by these rules.<sup>244</sup> When do the special mediation rules begin to operate?<sup>245</sup> When does the

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<sup>240</sup> See *Vernon v. Acton*, 732 N.E.2d 805, 810 (Ind. 2000) (“Requiring written agreements, signed by the parties, is more likely to maintain mediation as a viable avenue for clear and enduring dispute resolution rather than one leading to further uncertainty and conflict.”).

<sup>241</sup> See UNIF. MEDIATION ACT § 6 reporter’s note, at 2 (2003) (stating that “because the majority of courts and statutes limit the confidentiality exception to signed written agreements, one would expect that mediators and others will soon incorporate knowledge of a writing requirement into their practice”).

<sup>242</sup> See generally Coben & Thompson, *supra* note 177, at 316 (arguing that imposing technical rules in mediations unrelated to the parties’ reasonable expectation creates uncertainty and unfair surprise).

<sup>243</sup> Scholars continue to debate the issue of whether a mediator should assume the responsibility to ensure that the settlement agreements are enforceable. If mediators are not lawyers, this requirement is problematic. Where do they get the expertise? Are they practicing law? Are they still neutral? If the mediators are lawyers, the issues are still complicated. See generally Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 941–42 (expressing a concern that only lawyers could ethically be mediators if mediators gave opinions about outcomes).

<sup>244</sup> See, e.g., *Vernon*, 732 N.E.2d at 810. (concluding that post-suit ADR privilege rules were applicable to a pre-suit mediation because of the parties’ agreement).

<sup>245</sup> See, e.g., *Wilmington Hospitality, L.L.C. v. New Castle County*, 788 A.2d 536, 541 (Del. Ch. 2001) (finding the mediation privilege rule applicable despite claims that the

mediation end?<sup>246</sup> How do you treat settlements arrived at the week after or hours after the parties leave the mediation sessions?<sup>247</sup> Typical statute of frauds issues will be litigated, such as what types of writings qualify?<sup>248</sup> Do confirmatory memoranda satisfy the writing requirement?<sup>249</sup> What about the notes of the mediator?<sup>250</sup>

Some of these questions can be addressed by careful drafting. For example, the Uniform Mediation Act, which creates a privilege precluding evidence of oral agreements in mediation,<sup>251</sup> provides fairly specific definitions of what processes are governed by the act,<sup>252</sup> what types of writings count,<sup>253</sup> and when the mediation process begins for purposes of confidentiality.<sup>254</sup> The act, however, does not indicate when a mediation ends.<sup>255</sup> Thus, careful drafting will not totally avoid litigation.<sup>256</sup>

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parties did not sign an agreement to mediate as required by the statute and that the letters that comprised the settlement were written outside of the mediation process).

<sup>246</sup> See, e.g., *Regents of Univ. of Cal. v. Sumner*, 50 Cal. Rptr. 2d 200, 202 (Cal. Ct. App. 1996) (admitting an oral agreement because the parties “concluded their mediation session, and then created a transcript of the settlement”).

<sup>247</sup> See, e.g., *In re Bidwell*, 21 P.3d 161, 165 (Or. Ct. App. 2001) (ruling that settlement letters were connected to the pending mediation and therefore privileged).

<sup>248</sup> See, e.g., *Carr v. Runyan*, 89 F.3d 327, 330–32 (7th Cir. 1996) (enforcing an agreement dictated by the mediator and affirmed by the parties on tape), *cert. denied*, 519 U.S. 1117 (1997); *Tranakos v. Miller*, 470 S.E.2d 440, 444 (Ga. Ct. App. 1996) (ruling that transcripts of a taped telephone conversation qualified as a writing).

<sup>249</sup> See, e.g., U.C.C. § 2-201(2) (2003) (allowing a confirmatory response to satisfy the statute of frauds if the agreement is between merchants).

<sup>250</sup> See, e.g., *Reno v. Haler*, 734 N.E.2d 1095, 1099 (Ind. Ct. App. 2000) (finding that signed notes of the mediator qualified as a writing).

<sup>251</sup> See UNIF. MEDIATION ACT § 4 (2003) (creating a privilege for mediation communications with exceptions).

<sup>252</sup> See UNIF. MEDIATION ACT § 2(1) (2003) (defining mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute”); see also *id.* § 2 reporter’s note, at 1.

<sup>253</sup> *Id.* § 2(8) (defining a record as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”); see also *id.* § 3 (delineating when the Uniform Mediation Act is applicable)

<sup>254</sup> *Id.* § 2(2) (defining the mediation communications subject to protection by privilege as statements during a mediation or made for purposes of “considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator”).

<sup>255</sup> *Id.* § 2(2) reporter’s note, at 2 (stating that this issue was left to the “sound judgment of the courts” to reduce complexity in the text of the statute).

<sup>256</sup> *Id.* § 6 reporter’s note, at 2 (attempts to provide guidance and supply answers to issues not explicitly resolved in the text of the statute).

Conflicting policy choices, as well as ambiguous or incomplete text, will serve as grist for the mill of the litigation process. Professor Deason, of course, is correct that litigating disputes about oral agreements may require courts to delve deeply into the privacy of the mediation setting.<sup>257</sup> However, enforcing written agreements frequently requires inquiry into the context and communications leading up to the writing in order to effectuate the self-determined agreement of the parties.<sup>258</sup> The text of the Uniform Mediation Act, influenced by mediators, chooses to protect the long-term privacy interests of the mediator, even at the risk of undermining the recognized goals of self-determination and fair treatment of the parties in the individual mediation.<sup>259</sup> This conflict in values will continue to serve as impetus for parties to seek relief from the courts when technical obstacles or bright-line rules preclude them from enforcing reasonable agreements entered into fairly or from defending against alleged agreements obtained through unfair means.

The bright-line advanced by Professor Welsh is specifically designed to protect self-determination.<sup>260</sup> Some states currently adopt a cooling off period similar to the one proposed.<sup>261</sup> This bright line would be helpful to some

In other words, a participant's notes about an oral agreement would not be a signed agreement. On the other hand, the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.

*Id.*

<sup>257</sup> See *supra* notes 227–30 and accompanying text.

<sup>258</sup> See, e.g., *Coulter v. Carewell Corp.*, 21 P.3d 1078, 1078–84 (Okla. Civ. App. 2001) (accepting a mediator affidavit where a written mediated settlement agreement was not the complete agreement); *Martin v. Black*, 909 S.W.2d 196, 196–97 (Tex. App. 1995) (ruling that the issue of whether the parties intended to be bound by writings was a fact issue); see also *Strategic Staff Mgmt., Inc. v. Reseland*, 619 N.W.2d 230, 233–36 (Neb. 2000) (enforcing a written mediated settlement agreement). *But see* *Golding v. Floyd*, 539 S.E.2d 735, 738 (Va. 2001) (refusing to accept parole evidence because the written mediated settlement agreement was clear and unambiguous).

<sup>259</sup> UNIF. MEDIATION ACT § 6(c) (2003) (providing that if a party claims that an executed settlement agreement was reached through fraud or duress, the mediator retains a privilege not to provide evidence). See *Hughes*, *supra* note 87, at 23.

<sup>260</sup> See *supra* note 231–39 and accompanying text.

<sup>261</sup> See CAL. INS. CODE § 10089.82(c) (West 2003) (providing a three day cooling off period for unrepresented parties in earthquake insurance mediations) see also FLA. STAT. ANN. § 627.7015(6) (West 2003) (allowing an insured in a property insurance mediation three days to rescind a mediated settlement agreement); MINN. STAT. § 572.35(2) (2002) (providing a 72-hour cooling off period in debtor/creditor mediations); MINN. STAT. ANN. SPECIAL R. OF PRAC. FOR FOURTH JUDICIAL DIST. 2.7 (West 2002) (providing a 72-hour right of rescission of a mediation agreement in conciliation court).

mediation parties who are pressured by the mediator, the adverse party, or by their attorney to sign an agreement before leaving the mediation.<sup>262</sup> However, the cooling off period will assist parties only if they become free from the pressure and are able to recognize immediately that their true interests were not accommodated in the mediation settlement. The harangued party may be free from the immediate physical threat or coercion, but the impact of "threats," or exaggerated representations that influenced them to sign the agreement, may linger beyond a few days after the mediation. Further, if the language of the agreement is supplied by the mediator or is otherwise not clearly owned by the parties, the parties may not realize the inadequacy or ambiguity of the agreement until weeks or months later when it is time to comply with the agreement.

The cooling off period has the advantage of simplicity. It requires no explanation or showing that the agreement is unfair, only that the party does not want to agree any more. The proposed right of rescission represents a procedural compromise between the interests of finality and self-determination. As with all compromises, however, it does not fully protect either of these interests. No matter where the line is drawn, one day, three days, or one week, there will be situations raising serious concerns about unfair treatment in the mediation process. In cases like *Randle v. Mid-Gulf, Inc.*, where the party claimed he signed the agreement because the mediator would not let him leave despite chest pains, this cooling off period would protect the value of self-determination.<sup>263</sup> On the other hand, the escape clause would also benefit those like Ms. Olam, who according to the magistrate's version of the facts, would delay, agree, retract the agreement, and take advantage of every opportunity to postpone the need to address her responsibility to repay the money she borrowed.<sup>264</sup> Ms. Olam could again retract the agreement, further postponing resolution.<sup>265</sup>

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<sup>262</sup> See Welsh, *supra* note 10, at 91–92 (arguing that the right to rescind would also serve as a disincentive for the mediator or others to engage in coercive tactics).

<sup>263</sup> *Randle v. Mid-Gulf, Inc.*, No. 14-95-01292 CV, 1996 WL 447954, at \*2 (Tex. App. Aug. 8, 1996).

<sup>264</sup> *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1151 (N.D. Cal. 1999). Ms. Olam signed a loan agreement that she later claimed she never read. *Id.* at 1113. She signed a workout agreement in 1993 that she later claimed she signed under duress. *Id.* at 1114. She signed a second work out agreement in 1994 after foreclosure notices. *Id.* She again claimed duress and that she was incapable of understanding the agreement. When faced with foreclosure, Ms. Olam filed suit. *Id.* at 1114–15. In 1997, she agreed to mediate in exchange for a continuance, but canceled the mediation session on the day before it was scheduled. *Olam*, 68 F. Supp. 2d at 1115–16. Three weeks before the trial date, in August 1998 she again agreed to mediate. *Id.* at 1116. During mediation she signed a memorandum of understanding. *Id.* at 1117. After the mediator and her counsel reported to the court that the matter was settled, Ms. Olam called the court trying to retract her agreement. *Id.* Throughout the various proceedings, Ms. Olam was associated with counsel who Ms. Olam insisted were

In the seven state supreme court cases discussed previously,<sup>266</sup> in only one of the cases did a party make an immediate complaint about the mediation agreement, and this was after the court had dismissed the case.<sup>267</sup> If there was a three-day right of rescission, it is possible that the aggrieved parties in the other cases might have rescinded, but this is hard to predict. It is also possible that a three day cooling off period could have the practical effect of a three day statute of limitations, sort of a “speak now or forever hold your peace” rule. The cooling off period may in some cases assist in ensuring self-determination, but it cannot provide assurance that the parties’ interest in fair procedures or self-determination is protected in mediations.

## VII. THE TENSION BETWEEN CONTRACT PRINCIPLES AND MEDIATION’S GOALS

### A. *The Context of Mediation Is Different from Private Negotiation*

The prototype contract negotiation contemplates an arms-length process, where each party is assumed to act in its best interests to maximize its position.<sup>268</sup> Parties in arms-length negotiations should assume that the other party is self-interested as well. Trust no one, challenge everything. The parties should also expect that any agreement reached will create rights enforceable in the

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neither actually representing her or looking out for her best interests. *Id.* at 1117–19. As of 1999, the mortgage company was still trying to enforce her obligation to pay back the money she borrowed. *Id.* at 1119.

<sup>265</sup> Professor Welsh suggested a possible exception to the right of rescission for agreements reached on the eve of trial. Welsh, *supra* note 10, at 90. This exception could negate the effect of the rule, however, because of the many court annexed mediations that take place near the trial date.

<sup>266</sup> See *supra* note 9.

<sup>267</sup> See *Snyder-Falkingham v. Stockburger*, 457 S.E.2d 36, 38 (Va. 1995). After mediation and subsequent negotiations the parties reached agreement the night before trial. *Id.* at 38. The next day, the plaintiff’s lawyer went to court and moved on behalf of plaintiff to dismiss the case with prejudice. *Id.* It was later that day that plaintiff indicated that she did not want to be bound. *Id.*; see also *Strategic Staff Mgmt., Inc. v. Roseland*, 619 N.W.2d 230, 233 (Neb. 2000). In *Roseland*, the defendant indicated it did not want to be bound after the parties had reported at a pre-trial conference that settlement had been reached. *Roseland*, 619 N.W.2d at 233. The opinion is not clear when defendant first indicated it did not want to be bound. Defendant sent a letter indicating it would not execute the settlement papers two weeks after the pre-trial conference. *Id.*

<sup>268</sup> See FARNSWORTH, *supra* note 52, § 1.2 (“In a market economy, the terms of such bilateral exchanges are arrived at voluntarily by the parties themselves through this process of bargaining. Each party to an exchange seeks to maximize its own economic advantage on terms tolerable to the other party.”).

courts. Consequently, parties are on notice that they should be careful about the language they exchange and should use definite terms of promise only if they intend to be bound. The precise language used is the key to determining whether there is mutual assent and the key to determining the extent of the obligations and rights. The parties supply the language of agreement. The courts assume that the parties, operating in their own self-interest, would not select words of agreement if they did not intend to be bound.<sup>269</sup>

The core values in mediation are party empowerment and self-determination. While the focus under contract law is on what the parties said, the focus in a mediation should be on what the parties want. The goal is to empower the parties. Empowered parties will control their fate and reach a voluntary agreement tailored to their specific needs. The imposition of formal rules of contract enforcement and defenses may frustrate the parties from reaching the result they wanted. The context of a mediated agreement and a privately negotiated agreement are very different.<sup>270</sup>

Treating mediated settlements and adversarial negotiated settlements as if they were identical processes may be inappropriate. According to one commentator:

The goals of mediation are quite different than the goals of the litigation system. Mediation involves a radically distinct and contrasting paradigm—one that embraces a mindset, visions, skill set, and attitudes different from those of the prevailing adversarial norm . . . . Consequently, the rules, and the conduct to be governed by those rules, must be changed . . . .<sup>271</sup>

Even highly evaluative mediations may look and feel much different from the typical bilateral negotiation.<sup>272</sup> Participants in mediations are encouraged to trust the neutral, the process, and that all the participants in the mediation will act cooperatively to reach agreement. The parties are encouraged to be unguarded in communication and to work with the mediator and the other party to find common ground for agreement. To the extent the courts provide guidance or rules about how mediations are to be conducted, the rules focus on methods of encouraging candor.<sup>273</sup> Thus, rather than a guarded, adversarial process where

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<sup>269</sup> See *supra* notes 52–53 and accompanying text.

<sup>270</sup> See, e.g., Alfani & McCabe, *supra* note 10, at 205 (“[T]he general policy favoring settlement, while advancing the goal of judicial economy, may not always be consistent with mediation principles and values.”).

<sup>271</sup> Kovach, *New Wineskins*, *supra* note 152, at 942–43.

<sup>272</sup> See Welsh, *supra* note 10, at 64–78 (addressing the courts’ high tolerance for pressure tactics in judicial settlement conference).

<sup>273</sup> See, e.g., UNIF. MEDIATION ACT § 1 prefatory note (2003), stating:



the participants focus on maximizing self-interest and choosing words carefully, the mediation process encourages free exchange of ideas, sharing, creative thinking, collaboration, and brainstorming.

Because of the heightened expectations of candor and cooperation, parties may be less guarded and more susceptible to relying on representations coming from the adverse party. In the typical caucus-style mediation, statements of fact or representations are filtered through the court-sanctioned, neutral mediator, which gives the representations added significance and integrity in the eyes of the party. The compressed time frame and physical proximity of the participants also may contribute to an enhanced possibility of intimidation, coercion, or duress. Bilateral negotiation and court-ordered mediation present substantially different contexts, which affect the parties' expectations and behavior in different ways.

### *B. The Mediator as Neutral Facilitator or Advocate for Settlement*

The most significant difference in a mediation context is the unique role the mediator plays in influencing the agreement. Although both bilateral negotiations and mediations involve negotiation, the neutral's role in mediation dramatically changes the dynamics, expectations, and motivation of the parties. The mediator is not a stranger observing a debate, but can, and frequently does, take on a dominant role in the bargaining process. According to one commentator, "a skillful but biased mediator can have a substantial influence on the parties' settlement."<sup>274</sup> A skillful and unbiased mediator can also have a substantial influence on the parties' settlement.

Mediators are certainly skillful. Organizations throughout the country sponsor wonderful training programs, teaching neutrals how to facilitate, persuade, or influence parties into believing that a "self-determined" settlement of their dispute is in their best interests. Bias among mediators in the traditional sense is not a significant problem in court-connected mediations.<sup>275</sup> Rarely will

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Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. . . . The Drafters recognize that mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties' perception(s) of and attitudes toward these events, and that mediators encourage parties to think constructively and creatively about ways in which their differences might be resolved.

*Id.*

<sup>274</sup> Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1092 (2000).

<sup>275</sup> See UNIF. MEDIATION ACT § 9 (2003) (discussing a mediator's disclosures concerning conflicts of interest). The appearance of bias or conflicts of interest may be a more significant problem as experienced mediators or mediators in smaller communities may

parties experience a mediator appointed by the court who is biased in the traditional sense of favoring one party over the other, or having some financial or personal interest in one side prevailing.<sup>276</sup> But while most mediators are unbiased, most are not disinterested parties.

There are purely facilitative, or maybe even transformative, mediators who view their role as enhancing communication or strengthening relationships. Most mediators in court mediations, however, are striving to get a settlement.<sup>277</sup> In court-connected mediation, the "goal of mediation . . . is to resolve the dispute and agree on a settlement."<sup>278</sup> Mediators are trained at "Getting to Yes"<sup>279</sup> and are picked to be mediators because of their skill at extracting agreements.<sup>280</sup> A successful mediation is one that results in an agreement.<sup>281</sup>

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have had a past relationship with the parties involved. The Uniform Mediation Act and most professional codes include duties to disclose potential conflicts of interest. *See* Lehrer v. Zwernemann, 14 S.W.3d 775, 776 (Tex. App. 2000) (addressing a claim that the mediator failed to disclose a relationship with counsel).

<sup>276</sup> In business or institutional settings, parties may confront mediators or ombudspersons with employment or financial ties to one of the parties.

<sup>277</sup> *See* Riskin, *Understanding Mediator's Orientations, Strategies, and Tactics: A Grid for the Perplexed*, *supra* note 22, at 23–25; James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 485 (1996) (observing that "court-annexed and lawyer controlled mediations tend to be highly evaluative"); *see also* *In re Patterson*, 969 P.2d 1106, 1110 (Wash. Ct. App. 1999) (enforcing settlement where in the effort to obtain settlement the mediator told the parties that a lack of settlement would ruin the mediator's record).

<sup>278</sup> Deason, *supra* note 10, at 37.

<sup>279</sup> *See generally* ROGER FISHER & WILLIAM URY, *GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991) (providing strategy and structure for principled negotiating to resolve successfully all types of disputes).

<sup>280</sup> *See* Elizabeth Ellen Gordon, *Why Attorneys Support Mandatory Mediation*, 82 JUDICATURE 224, 224 (1999) (reporting that attorneys wanted mediators to actively intervene); Thomas B. Metzloff et al., *Empirical Perspectives on Mediation and Malpractice*, 60 LAW & CONTEMP. PROBS. 107, 144 (1997) (reporting that most medical malpractice lawyers surveyed "want mediators to perform an evaluative function"). *See generally* McAdoo, *supra* note 129, at 445 (reporting that "[t]he top factors motivating the choice of mediation [by Minnesota lawyers] are very settlement oriented—saving expenses, obtaining settlement, and providing a reality check on client and adverse party"); McAdoo & Welsh, *supra* note 7, at 388–89 (concluding that lawyers choose mediation and mediators to get their cases settled).

<sup>281</sup> *See* Feldman v. Kritch, 824 So.2d 274, 276 (Fla. Dist. Ct. App. 2002) (characterizing a mediation that did not result in settlement as a "failed mediation"); Riner v. Newbraugh, 563 S.E.2d 802, 804 (W.Va. 2002) (characterizing a mediation as unsuccessful because it did not result in settlement).

At the April 2002 American Bar Association Section of Dispute Resolution in Seattle, Washington, a featured speaker at a plenary session was Dr. Robert B. Cialdini, Ph.D., author of *Influence: The Psychology of Persuasion*.<sup>282</sup> He instructed the mediators how to use the “science” of influence to improve the art of persuasion. Mediators are trained and encouraged to use subtle tactics to move the recalcitrant parties toward agreement, to “influence”<sup>283</sup> the parties, or, as some characterize it, to help or facilitate the parties in understanding that settlement is in their best interests.<sup>284</sup> In the common practice of caucus-based mediation, the mediator controls the flow of information and the emotional tone. If a party actually confides in the mediator by disclosing secrets or exposing their bottom line, the mediator will decide which tactics will make best use of this information to obtain the agreement.<sup>285</sup> These tactics might be used to influence the adverse party, or may in a sense, be used against the party making the disclosure.

In court-connected mediations, mediators come into the process as neutrals “blessed” by the court. They are trained to use various strategies to obtain the trust of the parties and typically spend time at the beginning of the mediation trying to build that trust in part through promises of neutrality and confidentiality, as well as practiced listening skills. Skilled mediators do in fact develop a trust relationship with the parties and biased or not, can have, and do have, a significant impact on whether a settlement is reached and on the terms of that settlement.

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<sup>282</sup> ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1993). For further information about the conference, see See You in Seattle, April 4–6, 2002: The Fourth Annual ABA Section of Dispute Resolution Spring Conference, available at <http://www.abanet.org/dispute/seeyouinseattle.doc> (last visited Jan. 12, 2002).

<sup>283</sup> See, e.g., CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS, PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 327–33 (2d ed. 1996) (describing 12 ways that mediators “influence parties” toward a settlement).

<sup>284</sup> Alfini, *supra* note 17, at 66–74 (categorizing mediator styles as “trashers”—mediators who evaluate and focus on weaknesses in a party’s case to convince them to settle, “bashers”—mediators who try to get parties to make an offer and then work on the parties to reach a middle ground, and “hashers”—mediators who try to work things out more as a facilitator using flexible techniques); see also Riskin, *Understanding Mediator’s Orientations, Strategies, and Tactics: A Grid for the Perplexed*, *supra* note 22, at 37 (discussing techniques used by specific mediators to encourage settlement).

<sup>285</sup> See Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 806 (1999) (“The mediator’s control over the information flow increases when she meets privately with parties in a caucus. The mediator decides what information to solicit in a caucus and then how much of that information to reveal to the opposing party.”).

Mediators maintain a type of neutrality at the beginning of a mediation by not favoring either party. However, as the mediation progresses, mediators will use their persuasive skills and training to try to facilitate or influence the parties to agree. Obtaining agreement may require adopting tactics to get a recalcitrant party to move closer to agreement. Although not biased in a traditional sense, these mediators possess a strong bias toward settlement that motivates them to focus their skills and attention on the party who, in the mediator's view, is holding out for settlement.<sup>286</sup>

This bias toward settlement might be reflected in direct, highly evaluative statements of opinion, or even by dire predictions. Depending on the mediator's style, the bias might also be reflected by the subtle reframing of issues,<sup>287</sup> or delicate, but persistent questioning about the implications of not settling, all designed to move a recalcitrant party toward a "better" understanding of the value of settlement.<sup>288</sup> Gentle questioning may be more effective than blunt badgering, but both are designed to facilitate or exact settlement. As one commentator put it, when faced with parties who are too confident about the strength of their case:

A skilled mediator can dampen that overconfidence by exposing the parties to the reactions of disinterested parties apprised of the essential facts of the case. Whether this is done primarily by asking questions or by making statements

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<sup>286</sup> See Metzloff et al., *supra* note 280, at 123 (finding that in medical malpractice mediations, the "mediator function of 'educating a party' was usually directed at plaintiffs, perhaps because the mediator believed the defense counsel and insurer had already realistically informed the physicians of the likely outcomes").

<sup>287</sup> See Nolan-Haley, *supra* note 285, at 805 ("Whenever a mediator assists parties by identifying and reframing the issues in a dispute, she may influence the result of the mediation and the authenticity of the parties self-determination.").

<sup>288</sup> See MOORE, *supra* note 283, stating:

By raising questions about potential outcomes that the party may not like, the mediator can often moderate a party's position and influence him or her toward mutually acceptable settlement possibilities. For example a mediator might ask

- Do you think you can win in court?
- How certain are you? Ninety percent?
- Seventy-five percent? Fifty percent?
- What risks are you willing to take?
- What if you lose?
- What will your life be like then?

*Id.*

seems less a matter of ethics than style. In many mediation contexts, questioning is little more than evaluation by Socratic dialogue.<sup>289</sup>

Effective mediators are highly motivated to obtain an agreement. This zeal to reach settlement can result in over-aggressive neutrals using subtle, as well as not so subtle pressure to extract a settlement. Mediation sessions can run into the evening, long past the time when courtrooms are closed. Wearing down parties is an effective technique to move parties toward settlement. Blunt evaluation, sophisticated facilitation, and other tactics aimed at influencing parties to settle may be the reality. The President of the Houston chapter of the Association of Attorney Mediators was quoted as saying “what some people might consider a little bullying is really just part of how mediation works.”<sup>290</sup> Although the Texas federal district court repudiated the statement as not accurately representing the role of mediators, it is likely that some, and maybe many, mediators do more than facilitate communication.<sup>291</sup> The courts’ public description of the process may not reflect the actual practice in these private mediations.

A mediator need not be overtly coercive to influence the settlement. One technique of a skilled mediator is to focus on areas of agreement and downplay areas of disagreement. A mediator may even convince two parties who are disagreeing in different rooms that they are essentially in agreement. The mediator’s focus on settlement may even cloud the mediator’s assessment of whether the parties in fact are agreeing on all material elements. In numerous cases, the mediator has reported to the court that the parties have in fact reached agreement when one of the parties later claims no agreement was reached.<sup>292</sup> It is

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<sup>289</sup> Stark, *supra* note 92, at 788.

<sup>290</sup> Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998).

<sup>291</sup> *Id.* at 948 n.5.

<sup>292</sup> See, e.g., Sheng v. Starkey Labs., Inc. 117 F.3d 1081, 1082 (8th Cir. 1997) (addressing claims that no agreement was reached after mediator reported to the court that the parties had reached agreement); Silkey v. Investors Diversified Servs. Inc., 690 N.E.2d 329, 335 (Ind. Ct. App. 1997) (enforcing an agreement where the mediator reported agreement was reached but a party later contested that conclusion); Chappell v. Roth, 548 S.E.2d 499, 500–01 (N.C. 2001), *reh’g denied*, 553 S.E.2d 499 (finding no agreement when the mediator “reported to the trial court that plaintiff and defendants had reached ‘agreement on all issues’”); Few v. Hammock Enters., Inc., 511 S.E.2d 665, 667 (N.C. Ct. App. 1999) (addressing defendant’s claim of no agreement despite the mediator’s report that agreement was reached); Riner v. Newbraugh, 563 S.E.2d 802, 803 (W. Va. 2002) (refusing to enforce a settlement agreement drafted and signed by the mediator); see generally Vance v. Thomas, 829 So. 2d 319, 320 (Fla. Dist. Ct. App. 2002) (addressing attorney’s claim for attorneys’ fees for a mediated settlement agreement when the client maintained there was no agreement). But see Gordon v. Royal Caribbean Cruises Ltd., 641 So. 2d 515, 516 (Fla. Dist. Ct. App. 1994) (refusing to enforce an alleged agreement where the mediator reported impasse).

possible that in some of these cases the mediator's assessment is accurate and a party has changed its mind. It is also possible that in the mediator's rush to settlement, the mediator failed to appreciate the full extent of disagreement.

The role of the mediator changes the dynamics of settlement discussions. The mediator's subtle use of trust, technique, and language may provide the appearance of agreement when parties in fact have not agreed. Applying rules of enforcement that contemplate arms-length bargaining and focus on the specific language chosen by the parties may not be appropriate in circumstances where the language of the mediated agreement is supplied by a mediator<sup>293</sup> who may have overestimated the extent of agreement.

### *C. Applying Contract Law Within the Context of Mediation*

Perhaps Robert P. Burns had it right.<sup>294</sup> If the conciliatory mediation process creates, rather than resolves, conflict and parties come to court to enforce settlement agreements, flexible principles of contract law should be applied.<sup>295</sup> Where the court compels parties to participate in a process endorsed by the state, the courts should at least be open to address issues relating to the fairness of this state-sponsored process. Privatizing the justice system by referrals to unelected neutrals requires some supervision. Bright-line rules should not foreclose access to the courtroom when parties raise concerns about the fairness of the process the court forced upon them.

As Burns argued, contract law is flexible and takes context into consideration.<sup>296</sup> In applying traditional principles of contract formation and defenses, courts should, and do to some extent, take into account the context of mediated agreements. The context of settlements reached during a mediation is dramatically different from the context of privately negotiated settlements. While traditional contract principles may look to whether the parties said they agreed, mediation theory would focus on whether parties voluntarily wanted to agree. The mediation context should make courts extremely cautious about finding that ambiguous language, whether written or oral, creates legal rights. The courts'

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<sup>293</sup> See generally Weller, *supra* note 10, at 15, stating:

Often the mediator even controls the language of the final settlement agreement between the parties. This power stems from the fact that the parties are before the mediator precisely, because they were unable to find a common language with which to negotiate. They are thus led to adopt the language of the mediator.

*Id.* (citing Susan S. Sibley & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7, 26 (1986)).

<sup>294</sup> See *supra* notes 217–21 and accompanying text.

<sup>295</sup> *Id.*

<sup>296</sup> See *supra* notes 220–21 and accompanying text.

focus on settlement and finality must be tempered. The West Virginia Supreme Court addressed this issue in refusing to enforce an alleged mediation settlement agreement stating, “[w]e do recognize that the mediation process will only work while the parties are ensured that the process is fair to both sides and where the attainment of settlement is viewed as non-compulsory.”<sup>297</sup>

The traditional defenses of duress, misrepresentation, undue influence, and mistake were developed in the context of bilateral, adversarial negotiations. In this context, the courts’ interest was to police the private bargaining process only where it yielded unreasonable results because of unfair tactics of an adversary.<sup>298</sup> If the result was within the range of acceptable results, the courts were not interested in correcting the bargaining conduct of the parties. Settlements in court mediations, however, raise different concerns and expectations. The concept of self-determination that is central to the mediation culture suggests that a fair result is one in which the parties voluntarily agree is in their best interests, without regard to what lawyers or judges might predict they would receive if they went to court.<sup>299</sup> Absent a voluntary and self-determined agreement, the settlement in mediation cannot be fair even if it is consistent with what lawyers predict would result in court.

In adversarial negotiations, parties should be on their guard. Good advice would be to speak cautiously and verify everything. A court will provide no relief to a party who relies unreasonably on the adverse party’s statements, or who yields too quickly to the adversarial threats. If an adversary asserts pressure, the reasonable party is not supposed to be accommodating and capitulate, but should stand tall and fight back. In that sense it may never be reasonable for a party in court-connected mediation to rely on a representation by the adverse party or the neutral. Rarely will it be reasonable to give in to coercion or pressure. All representations in court-connected mediations could be verified in the discovery process, and most wrongful threats could be addressed head on in subsequent litigation. However, the context of mediation suggests a more flexible approach to these common law defenses.

In a different context, courts applying contract reliance principles have made similar adjustments in substantive law principles. For example, in the famous California case, *Drennan v. Star Paving Co.*, the court adjusted contract principles to assure fairness in pre-agreement reliance cases.<sup>300</sup> A general

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<sup>297</sup> *Riner*, 563 S.E.2d at 810.

<sup>298</sup> Successful contractual defenses are nearly non-existent if the complaining party was represented by counsel.

<sup>299</sup> See Love, *supra* note 18, at 739–41.

<sup>300</sup> *Drennan v. Star Paving Co.*, 333 P.2d 757, 761 (Cal. 1958); see also RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981) (codifying the *Drennan* holding); see generally FARNSWORTH, *supra* note 53, § 3.26 (discussing the development of pre-contractual

contractor submitted and won a contract bid relying in part on the bid of a subcontractor.<sup>301</sup> The subcontractor later tried to withdraw its bid. The subcontractor argued that based on traditional contract law, offers are revocable until accepted, and there was no acceptance.<sup>302</sup> The court found that the subcontractor could not revoke its offer notwithstanding traditional rules of offer and acceptance.<sup>303</sup> In the context of these arrangements, the court found that the subcontractor submitted a bid expecting and desiring that the general contractor would rely on the bid.<sup>304</sup> The general contractor did rely on the bid to its detriment.<sup>305</sup> The court concluded that principles of justice require that the subcontractor not be allowed to retract its bid.<sup>306</sup>

In the mediation context, if a party relies on false, material representations that are made for the purpose of influencing the party to settle, justice would require at the very least that the settlement be set aside, even though it might have been possible for the party to recess the mediation and verify the facts through compulsory discovery. When a party accedes to unfair pressure imposed by the mediators or the adverse party, the agreement should not be enforced even if the agreement is within the range of possible results at trial. Flexible principles of contract law need to adjust to the reality of the pressure and expectations created in the mediation process.

In particular, courts must account for the ubiquitous role of the mediator when claims of unfairness in the mediation process are raised. The conflicting roles of private, court-sanctioned mediators who are neutral, yet zealous advocates for settlement and serve as both confidants and communicators to the adverse party, can implicate significant concerns about the fairness of the process. Resolving these issues is difficult in the context of the prevailing sentiment toward confidentiality and privilege in mediation.

#### *D. Using Mediation Secrecy Rules to Preclude Supervision of the Mediation Process*

The mediation community has had great success in convincing courts and legislatures that privacy and secrecy are essential to the effectiveness of ADR

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liability).

<sup>301</sup> *Drennan*, 333 P.2d at 758.

<sup>302</sup> *Id.* at 759.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 759.



processes.<sup>307</sup> Much of the ADR community values mediator privacy because it empowers mediators, and empowered mediators can use that power, in turn, to empower the parties to reach a voluntary agreement.<sup>308</sup> The predominant justification from the ADR community for mediator privacy rules stems from a facilitative model of mediation, where neutrals assist parties in assessing interests and in communicating with the other party.<sup>309</sup> For this process to be successful, parties must be free to engage in a frank exchange of ideas.<sup>310</sup> The parties must be assured that their candid concessions will not be used against them. Of course, empowered mediators can also use that power to force or exact settlement, overcoming a party's resistance to settlement.

The reality in court-connected mediation strays considerably from the facilitative model. While mediators may begin the process using facilitative language to encourage the parties to speak candidly, frequently the mediators will shift tactics.<sup>311</sup> Court-connected mediators settle cases. They evaluate, influence, and encourage parties to settle. The typical caucus-style mediator is the communicator, not the facilitator. In most court-connected mediations, the mediator does not encourage communication, but rather carefully limits communication between the parties. The mediator puts the parties in separate rooms so that they cannot speak to each other. The mediator becomes the focal point of the communication, choosing what to say and what language to use in speaking with the isolated parties. If the dispute escalates into litigation relating to the mediation, stringent privilege rules will frustrate resolution consistent with

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<sup>307</sup> The main focus of the tremendous effort to produce the Uniform Mediation Act was centered on confidentiality and privacy. See Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. Ill. L. Rev. 265, 270 (2002) ("The UMA primarily provides for the privileged nature of mediation communications. While the Act does address other issues . . . the vast majority of the UMA addresses the issue of privilege and confidentiality.").

<sup>308</sup> See UNIF. MEDIATION ACT prefatory note (2003):

[M]ediators typically promote a candid and informal exchange . . . and encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> See Imperati, *supra* note 25, at 741 (reporting that most parties expect a mediator to use a combination of facilitative and evaluative techniques); Levin, *supra* note 91, at 269 ("In practice, however, many mediators combine aspects of facilitative and evaluative mediation . . ."); McAdoo, *supra* note 129, at 446 (stating that "[o]ver two thirds of the lawyers surveyed reported a mix of facilitative and evaluative tactics being utilized by mediators").

the parties' self-determination. To understand both the context and what was communicated, the courts frequently must focus on what the mediator said, whether the agreement is oral or written.<sup>312</sup>

Judges also value mediator privacy but usually for a different reason. Empowered mediators can use that power to exact settlement.<sup>313</sup> Bright-line rules of privilege limit access to courts, thus reducing the court's docket. Therefore, cloaking the mediation in a blanket of secrecy is an effective tool for getting rid of cases. Courts do not want to upset the magical process that makes cases disappear. Bright-line rules are expedient. The court in *Willis v. McGraw*<sup>314</sup> stated this principle succinctly.<sup>315</sup> In order to protect the effectiveness of mediation as a tool to extract settlements as a means to save judicial resources, the court adopted a bright-line rule to assure the "salutary purposes of [court ordered ADR] are achieved."<sup>316</sup> The court proclaimed that it will "not involve itself under any circumstances in sorting out disagreements amongst the parties from the mediation process."<sup>317</sup>

The bright-line secrecy rules are clear and efficient but conjure up the image of a WWE "no holds barred" cage match. When the victor emerges, no questions will be asked.<sup>318</sup> While privacy is absolutely important to effective mediation

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<sup>312</sup> There are many cases where a written agreement is complete, fair on its face, and the moving party can make no showing justifying considering evidence outside of the four corners of the settlement. *But see* Gelfand v. Gabriel, No. B152557, 2002 WL 1397037, at \*3 (Cal. App. Dep't. Super. Ct. June 27, 2002) (considering statements from the mediator on the issue of whether a party voluntarily agreed to the settlement he signed); Griffin v. Wallace, 581 S.E.2d 375, 376 (Ga. Ct. App. 2003) (considering representation made to the parties by the mediator to determine whether an offer was outstanding when it was purportedly accepted).

<sup>313</sup> See, e.g., *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979) ("The guarantee of confidentiality permits and encourages counsel to discuss matters in an uninhibited fashion leading to settlement, the simplification of the issues and [the resolution of] any other matters.") (citing CIVIL APP. MANAGEMENT PLAN R. 5(a)); see also Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View From the Courts*, 2000 J. DISP. RESOL. 11, 29 (remarking that policy makers value confidentiality so that mediators are "likely to generate settlements").

<sup>314</sup> *Willis v. McGraw*, 177 F.R.D. 632, 632 (S.D. W. Va. 1998).

<sup>315</sup> *Id.* at 632.

<sup>316</sup> *Id.* at 633. According to the court, breaching the secrecy of a court-conducted mediation process "would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed." *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> See *Foxgate Homeowners' Ass'n. v. Bramalea, California, Inc.*, 25 P.3d 1117, 1126 (Cal. 2001) (recognizing that the mediation privilege statute would allow the party accused

processes, absolute secrecy does not ensure fair treatment.<sup>319</sup> Few Americans outside of the United States Defense Department believe that secrecy will ensure that proceedings are fair. Drawing bright lines to protect mediator secrecy reduces the number of litigated cases but may ignore concerns about fair process, fair bargains, and self-determination of the parties.

### VIII. REGULATING THE PROCESS

Thousands of cases are successfully resolved annually in the United States by principled, talented mediators who insure the integrity and fairness of their processes. The recent rash of unhappy mediation participants in the appellate opinions may be isolated cases. Assuming that access to the courts is not arbitrarily cut off by bright-line rules, perhaps the litigation process can adequately address the claims of unfairness in individual cases. Accommodating the unique context of mediation, courts can apply flexible principles of contract law to address isolated issues of fairness in the individual case.

On the other hand, the increased appellate litigation by disgruntled mediation participants may reveal a pervasive problem reflecting on fairness in court-connected mediation processes. Neither contract law, nor bright-line rules, will address this process problem.<sup>320</sup> In fact, the bright-line rules will shelter and perpetuate unfair mediation practices. To assure a fair process, the courts need to supervise more carefully the behaviors of both the participants and the mediator.

To a large extent, the mediation community has been opposed to specifically delineating the shape of the mediation and the precise role of the mediator in

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of the misconduct to assert the privilege precluding proof of misconduct); *Eisendrath v. Super. Ct.*, 134 Cal. Rptr. 2d 716, 720 (Cal. Ct. App. 2003) (noting that the privilege rules vest in the adverse party the power to refuse to allow testimony about mediation communications that could prove that there was a mistake in drafting the mediation agreement that was not discovered by an unrepresented party until after it was signed).

<sup>319</sup> See Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 594 (2001) (stating that “[b]ecause ADR processes are cloaked with confidentiality privileges conducted by private third-party neutrals who are unaccountable to the public or judicial system and not bound to follow or apply the law, . . . the concern, or at least perception that participants may abuse the ADR process comes to the forefront”).

<sup>320</sup> See Phyllis E. Bernard, *Only Nixon Could Go to China: Third Thoughts on the Uniform Mediation Act*, 85 MARQ. L. REV. 113, 119 (2001) (arguing that insuring that the processes used in mediations are fair is more important than focusing on how to fix unfair agreements after they occur). *But see* John Lande, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 137 (2002) (arguing that existing contract defenses can provide adequate relief for parties claiming misrepresentation).

order to encourage self-determination of the parties, flexibility, and creativity. The parties should be free to set their own rules to address their own problems. However, as a practical matter, individual mediators, not the parties, tend to set the ground rules and practices of the mediation. In theory, the ground rules can be negotiated by the parties. Frequently, however, the rules are embodied in a form contract to mediate that is crafted by the mediator and may be crafted to serve the mediator's interests as much as the interests of the parties. The Uniform Mediation Act hardly addresses procedural fairness in the mediation process itself. It focuses instead on privilege and confidentiality rules. The Uniform Mediation Act alludes to principles of self-determination,<sup>321</sup> insures the right to be represented,<sup>322</sup> and requires a mediator to disclose conflicts of interest<sup>323</sup> but otherwise seems to leave it to the contract litigation process and the good values of both the mediator and the parties to insure a fair process. In fairness to the drafters, the Uniform Mediation Act is not limited to court-connected mediations. Perhaps when drafting statutes that are applicable to the widely-varied contexts in which mediations take place, drafters should be careful that across-the-board procedures might be inappropriate in the differing contexts.<sup>324</sup> However, the specific context of court-connected mediation processes cries out for regulation assuring procedural fairness.

Parties ordered to mediation in the context of adversarial litigation are looking for resolution, not enhanced communication or creative problem solving. There appears to be very little creativity in court-connected mediation.<sup>325</sup> Further, the parties and public have expectations of fair procedures when they bring their dispute or are compelled to defend a dispute in the public court system. The court system as well has an interest in assuring that its exercise of

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<sup>321</sup> See UNIF. MEDIATION ACT § 2 definitions (2003) ("‘Mediation’ means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”).

<sup>322</sup> *Id.* § 10 (discussing participation in mediation).

<sup>323</sup> *Id.* § 9 (discussing a mediator’s disclosure of conflicts of interest).

<sup>324</sup> See Bernard, *supra* note 320, at 119 (“A uniform act designed to ‘simplify,’ ‘clarify,’ or ‘make reasonably consistent’ the various rules governing mediation throughout the United States, nearly by definition, threatens to chill the innovations in mediation that gave the process value.”).

<sup>325</sup> See Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri: Supreme Court ADR Report*, 67 MO. L. REV. 473, 530 (2002) (finding that over 75% of respondents reported they never or rarely included non-monetary provisions in mediation settlement agreements); Metzloff et al., *supra* note 280, at 119; Welsh, *supra* note 28, at 813 (“Empirical data, however, indicates that mediators infrequently act to encourage the search for creative, non-monetary settlements, and that relatively few attorneys choose mediation for its creative potential.”) (citing McAdoo, *supra* note 129, at 429, 445).

the judicial powers is fair and just.<sup>326</sup> As Professor Welsh explains, “[t]he goal of an ADR program that is sponsored by a public court cannot be simply to have the disputing be over. The business of the courts is not business—it is justice.”<sup>327</sup>

Particularly where ADR is ordered by the court, it is not enough to hand over cases to unelected private citizens with a week or two of training, and turn them loose to facilitate, transform, evaluate, settle, advise, counsel, influence, or whatever they please under the guise of flexible mediator practices. The public justice system, not the individual preferences of each mediator, must establish the goals and the values of this private/public justice function. It is wrong for the courts to assume that because the mediator is not given the official power to adjudicate a result, that the mediator should not have any public responsibility to follow fair procedures. Mediators appointed by the court have enormous power to influence the agreement.

The role, function, and power of the mediator should be delineated in the initial referral to the mediator. In this referral, the court should set forth the ground rules, not leaving it to individual mediators to develop their individualized process.<sup>328</sup> Enhanced training, sharpened ethical codes, and empowered ethical boards at some point might assist in assuring fair process.<sup>329</sup> Ethical standards, however, must derive from an agreed upon understanding of appropriate behaviors. Until the courts can clearly settle on what is expected of a court-connected mediator, ethical guidelines or more training can be pointless and even counterproductive.<sup>330</sup> For example, if the courts and parties expect the mediator to be highly evaluative and settle cases, only continued confusion will result because the ethical codes and ADR training<sup>331</sup> tend to be based on a facilitative model.

<sup>326</sup> See *In re Atlantic Pipe Corp.*, 304 F.3d 135, 147–48 (1st Cir. 2002) (concluding that when a court orders a party to mediate, the court must ensure that the mediation process contains procedural and substantive safeguards to assure a fair process).

<sup>327</sup> Welsh, *supra* note 28, at 837.

<sup>328</sup> The ground rules to court-connected mediations should come from the court, not the mediator. The parties, of course, should be allowed to add ground rules, but the basic representations about the law, the power, and the role of the mediator, or the extent of confidentiality should come from the court.

<sup>329</sup> See Menkel-Meadow, *supra* note 5, at 431 (suggesting that “many courts are now facing questions about the ethical and legal limits of private contracting for ADR services where egregious ethics violations have occurred”).

<sup>330</sup> See Imperati, *supra* note 25, at 721 (discussing the dissonance between the language in various codes and accepted practices).

<sup>331</sup> See generally McAdoo, *supra* note 129, at 428, 445–47 (reporting that, in Minnesota, the court approved training requirements for mediators envisioned a “facilitative process in which parties exercise a great deal of self-determination in the decision making process,” but private caucuses and mediator evaluation was a common practice).

The courts should be up front and direct about the purpose of the process. Unless there is a major change in judicial philosophy, the purpose of court-connected mediation is to settle cases, not to facilitate communication. Presently, courts provide the mediator little guidance, instruction, or supervision on how to extract the settlement in a fair process. To some extent, the proponents of facilitative mediation have hijacked the rhetoric in the litigation process. While court-connected mediations frequently are governed by rules using facilitative language and theory, the practice in the court-connected mediations is highly evaluative.<sup>332</sup> This dissonance gets passed on to the parties.

For example, the parties may be told that the process is aimed at facilitating communication, but then they are placed in separate rooms and not allowed to talk with each other. The parties may be told the mediator is neutral with no power, but then the mediator turns into an advocate for settlement with substantial influence and practical power. The parties are told to suspend their adversarial postures and be candid, only to find out they need to constantly be on their guard and not rely on statements made by the adverse party or mediator. As a matter of basic fairness, the parties ordered to participate in the process should be told directly, not through code words, what to expect.

Mediators need to be told directly the goals and nature of the process. To say the goal is to settle cases is not enough. Should the mediators follow the model of the coercive judicial settlement conference and exact settlement through whatever tactics are expedient?<sup>333</sup> When the courts endorse mediation as a court-connected process, to what extent do they intend to incorporate the core values of self-determination and voluntary participation that distinguishes the traditional mediation process from traditional settlement conferences and private negotiations?<sup>334</sup>

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<sup>332</sup> See Brazil, *supra* note 313, at 13 (stating there is a “gap” between appearances and reality in court ADR programs. It consists of a space between rule—“described ADR process protocols, on the one hand, and, on the other how the neutrals actually conduct the ADR sessions”).

<sup>333</sup> Over regulation is always a danger when attempting to correct abusive practices. For example, it may not be necessary to put time limitations on mediation sessions to eliminate the practice of wearing down the will to resist. To avoid analogous abusive practices in depositions, however the federal courts now limit depositions to one day of seven hours. See FED. R. CIV. P. 30 (d)(2). Through training, supervision, or rulemaking, mediators should be clearly informed whether the court favors or disfavors the process of extracting settlement by wearing down the will to resist.

<sup>334</sup> See, e.g., Ronald Lee Gilman, *Resolving Commercial Cases Through Alternative Dispute Resolution*, 26 U. MEM. L. REV. 1121, 1124 (1996) (describing mediation as “assisted negotiation”); Nolan-Haley, *supra* note 285, at 777 (describing mediation as “assisted negotiation”).

At the very least, courts should be clear about expectations for telling the truth. The truth-telling should start with what the participants are told about the process. If settlement is the focus, which seems to be the case in court-connected mediations, the parties should be told that directly.<sup>335</sup> The mediator should disclose at the beginning that he or she will be an advocate for settlement and will use their skills to influence or persuade both parties to find common ground and agreement. The courts should explain to the parties the extent to which they will be provided opportunity to participate, or to direct the process.<sup>336</sup>

Beyond a duty to tell the truth, courts should be explicit about any obligations the parties have to negotiate in good faith. According to Professor Kovach:

[I]f mediation is to survive as an alternative and fulfill any of the expectations, objectives, and goals of the process, which range from cost and time savings to satisfaction in settlement and empowerment, then the way the process is approached must be changed. The participants, the parties, and the lawyers must not be able to use the process to gain adversarial advantage, which intentionally disadvantages other parties.<sup>337</sup>

If the parties are required to act in good faith, the courts must provide an explicit definition. Professor Kovach suggested a number of different elements, defining good faith as complying with applicable law, court orders, the contract to mediate, or the mediator's rules. She included an obligation to attend with settlement authority and to participate in meaningful discussions. She also would impose a duty not to affirmatively mislead the mediator or the adverse party.<sup>338</sup> She proposed various fines and fees and even mandatory education for a breach of these obligations.<sup>339</sup>

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<sup>335</sup> Lande, *supra* note 320, at 138.

<sup>336</sup> See Hensler, *supra* note 26, at 15 (suggesting courts accurately inform the parties of various ADR options including the parties' role in the process).

<sup>337</sup> Kovach, *supra* note 152, at 581; see also James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 256 (1999) (advocating that Model Rule of Professional Conduct 4.1 be amended to impose an obligation on lawyers not to make false statements of fact or law in negotiations, or to assist a client in a settlement based on a client's false statement); Weston, *supra* note 319, at 59 (arguing for a good faith standard).

<sup>338</sup> Kovach, *supra* note 152, at 622–23; see also Weston, *supra* note 319, at 595 (discussing ways to address abusive conduct in closed-door matters). *But see* Brazil, *supra* note 313, at 32–34 (expressing a concern that a good faith requirement would “liticize mediation”); Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?* 46 SMU L. REV. 2079, 2096 (1993) (criticizing good faith requirements but advocating a minimal meaningful participation standard).

<sup>339</sup> Kovach, *supra* note 152, at 609.

John Lande,<sup>340</sup> who viewed the good faith requirement as ineffective and counter-productive, conceded that, “[a]lthough most participants do not abuse the mediation process, some people use mediation to drag out litigation, gain leverage for later negotiations, and generally wear down the opposition.” Lande suggested a series of procedural options, which do not seem necessarily inconsistent with imposing good faith obligations including pre-mediation submissions, compelled attendance, a more specific requirement for the length of attendance, and a cancellation policy.<sup>341</sup> Whatever the expectations are for participant behaviors, the courts should provide explicit direction. The “No Holds Barred Cage Match” is not an appealing metaphor.

### IX. CONCLUSION

The current spate of disgruntled participants in court-connected mediations should cause some reflection about the actual and perceived fairness of those processes. The fact that the mediation process is occasionally being abused should not come as a surprise; no process can assure perfection. However, the extent to which the judicial system may in fact be contributing to the unfairness, and creating false expectations in the public, is cause for concern. At the end of a highly structured, adversarial, pre-trial proceeding, the parties are compelled to participate in an extremely flexible process that may take many different shapes depending on the predilection or influences of the mediator. The process may be described to the parties as a conciliatory process or as a consensual process that the parties in fact control; but, in fact, the process is developed and perfected by professionals designed to influence the parties into believing that settlement now is in their best interests. The cloak of secrecy draped around the process provides the opportunity for unchecked abuse. The process remains efficient or expedient in the sense that it resolves a lot of cases, but does it comport with society’s expectation of justice? After all, coercive judicial settlement conferences settled a lot of cases before the days of mandatory ADR.<sup>342</sup>

Ten years from now, at CLE conferences, it is likely that some participant will stand up and proclaim that mediation is still the better way. Will it be the better way because it gets rid of a lot of cases, or will it be viewed as the better way because it assures a fair process leading to voluntary, self-determined resolution of disputes?

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<sup>340</sup> Lande, *supra* note 320, at 69.

<sup>341</sup> *Id.* at 126–36.

<sup>342</sup> See Galanter & Cahill, *supra* note 4, at 1341 (providing an analysis of pre-trial disposition of civil cases).